NO. 82-5789

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBYN LEROY PARKS,

Petitioner,

-v-

STATE OF OKLAHOMA,

Respondent.

WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS
PETITION FOR WRIT OF CERTIORARI

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I.
QUESTIONS PRESENTED

1. Can a state appellate court circumvent the constitutional mandate that a capital jury be given an option of convicting a defendant on a lesser included offense where the evidence supports such a finding by requiring that the corpus delicti of the lesser crime be proved independent of a statement admitted into evidence of the lesser included crime.

2. Can a state appellate court consistent with the Eighth and Fourteenth Amendments to the United States Constitution limit a jury's consideration of mitigating circumstance by approving a jury instruction which precludes the jury from considering sympathy, sentiment, passion or prejudice or any other arbitrary factor in determining punishment?

3. Is it consistent with the Eighth and Fourteenth Amendments to the United States Constitution to instruct the jury they may consider any and all factors including non-statutory aggravating circumstances in determining punishment?

4. Can a state appellate court consistent with the Eighth and Fourteenth Amendments to the United States Constitution limit the scope of appellate review of capital cases by merely concluding that a particular death sentence was not disproportionate and was similar to other cases when evidence conclusively demonstrates that 90% of all capital cases in the State of Oklahoma require a finding of the aggravating circumstance cruel, heinous or atrocious or probability of future acts of violence which would constitute a continuing threat to society and wherein this sole aggravating circumstance was not the basis for the death sentence in any other capital case in the state?

5. Can a state appellate court consistent with the Eighth and Fourteenth Amendments to the United States Constitution interpret their capital punishment statute as mandatory unless mitigating circumstances outweigh aggravating circumstances and does such interpretation unconstitutionally shift the burden of proof to petitioner to prove he should be given a sentence of life?

INDEX

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PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

The Petitioner, ROBYN LEROY PARKS, requests that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered in this case on August 26, 1982.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals was published and appears at 651 P.2d 686 (Okl.Cr. 1982) It appears in Appendix A to this petition. No opinions were rendered by the trial court.

JURISDICTION

The petitioner is seeking a Writ of Certiorari to the Oklahoma Court of Criminal Appeals in order to review a judgment entered on August 26, 1982. A timely Petition for Rehearing (Appendix B), was denied by the Court of Criminal Appeals on September 28, 1982. (Appendix C) Jurisdiction is invoked under 28 U.S.C. §1257[3], petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

2. The United States Constitution, Amendment VIII provides:

> "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted."

3. The United States Constitution, Article XIV provides, in pertinent portion:

> "...Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

4. 21 O.S. §701.7 (1976) provides, in pertinent portion:

> Murder in the First Degree
> A. "A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

5. 21 O.S. §701.8 (1976) provides, in pertinent portion:

> Murder in the Second Degree
> "Homicide is murder in the second degree in the following cases: (2) when perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in §1 sub section (b), of this act."

6. 21 O.S. §701.9 provide:

> Punishment for Murder
> A. "A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."
>
> B. "A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life."

7. 21 O.S. §701.10 provides:

> Sentencing proceeding - Murder in the First Degree.
> "Upon conviction or adjudication of guilt of a defendant of Murder in the First Degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be

sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practical without presentence investigation. If the trial jury has been waived by the defendant and the state or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In a sentencing proceeding evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the State has made known to the defendant prior to trial shall be admissible. However this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of United States or the State of Oklahoma. The State, the defendant or his counsel shall be permitted to present argument for or against sentence of death."

8. 21 O.S. §701.11 provides:

Instructions-jury findings of aggravating circumstance.
"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing signed by the foreman of the jury the statutory aggravating circumstance or circumstances which, it unanimous found beyond a reasonable doubt. In non-jury cases, the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found, that any such aggravating circumstances outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

9. 21 O.S. §701.12 provides, in pertinent portion:

Aggravating Circumstances
"Aggravating circumstances shall be ... (4) the murder was especially heinous, atrocious or cruel; (5) the murder was committed for
the purpose of avoiding or preventing a lawful arrest or prosecution...(7) the existence of a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society;..."

10. 21 O.S. §701.13 provides:

Death Penalty-Review of Sentence

"Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be on a form of a standard questionaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine: (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors; (2) whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors the court with regard to review of death sentences, shall be authorized to: (1) affirm the sentence of death; or (2) set the sentence aside and to remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken and the review on appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

11. 21 O.S. §1550.22(a) provides:

> Taking credit or debit card--Receiving taken credit or debit card.
> "A person who takes a credit card or debit card from the person, possession, custody or control of another without the cardholder's consent, or who, with knowledge that it has been so taken, receives the credit card or debit card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder, is guilty of card theft and is subject to the penalties set forth in Section 1550.33(a) of this title."

STATEMENT OF THE CASE

The petitioner was charged in an Oklahoma state trial court with the crime of Murder in the First Degree, 21 O.S. §701.7 (1976) Supp. in connection with the homicide of Abdullah Ibrahim. R 1*

The evidence adduced at petitioner's trial showed the victim was found shot to death on the floor of a Gulf Service Station where he was employed. An unused charge slip bearing various notations on both the front and back, which was apparently used as a scratchpad to compute the customer's purchases and figure tax, was found at the scene of the homicide by an investigating police officer. This same charge slip also had a license tag number written across the front of it, XZ-5710. It was subsequently determined that the owner of the vehicle bearing that license tag number was petitioner. Approximately two weeks thereafter an informant, James Clegg, testified that he had allowed the police representatives to tape two conversations that he had with petitioner who was then in San Pedro, California. During the course of the August 29th telephone conversation, petitioner allegedly told Clegg that he shot the victim because the victim had written down his tag number and petitioner was afraid the victim would call the police when he realized petitioner's credit card was hot.

At the conclusion of the trial, the trial judge instructed on the crime of Murder in the First Degree pursuant to 21 O.S. §701.7. The court refused petitioner's requested instruction on Murder in the Second Degree, 21 O.S. §701.8 on the grounds that there was insufficient evidence of use of a bogus credit card. (Tr p. 543).

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*The record in the Oklahoma Court of Criminal Appeals consists of a bound record consisting of the instruments filed in the trial court including the jury instructions (hereafter referred to as R.) and a trial transcript (hereafter referred to as Tr.)

Despite this ruling by the trial court, the argument of the prosecutor to the jury was directed to the fact the purpose of the murder was because the defendant was using a fradulent credit card. (Tr p. 621-623).

After the jury convicted petitioner of First Degree Murder, a separate sentencing hearing pursuant to 21 O.S. §701.10 was had in the presence of the jury. The jury was instructed that "In arriving at your determination of punishment, you must first determine whether at the time the murder was committed any one or more of the following statutory aggravating circumstances existed beyond a reasonable doubt: (1) the murder was especially heinous, atrocious or cruel; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; (3) the existence or probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society...(R 32).

The court further guided the jury's assessment of the aggravating circumstance cruel, heinous and atrocious by defining these terms. (R 33). No guiding instruction was given regarding probability of future acts of violence which would constitute a continuing threat to society or the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. The court then instructed the jury on a list of minimum mitigating circumstances and told the jury that what facts or evidence may constitute additional mitigating circumstances was for the jury to determine. (R 34). The court then instructed:

> "In the event you find unanimously that one or more of these aggravating circumstances existed beyond a reasonable doubt, then you would be authorized to consider imposing a sentence of death.
>
> If you do not find unanimously beyond a reasonable doubt one or more of the statutory aggravating circumstances existed, then you would not be authorized to consider the penalty of death, and the sentence would be imprisonment for life.

> Even if you find unanimously one or more of the aggravating circumstances existed beyond a reasonable doubt, and if you further find that such aggravating circumstance or circumstances is outweighed by the finding of one or more mitigating circumstance, then in such event the death penalty shall not be imposed, and the sentence would be imprisonment for life. " (R 35).

The court further told the jury in Instruction No. 9 that:

> "In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider all the facts and circumstances of this case whether presented by the State or the defendant and whether presented in the first proceeding or this sentencing proceeding...
>
> You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdicts as the evidence warrants when measured by these instructions." (R 38).

The jury returned with a verdict sentencing the defendant to be put to death after finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution but failing to find the murder was especially heinous, atrocious or cruel or the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Pursuant to that verdict, the trial court sentenced the defendant to be put to death.

On appeal to the Oklahoma Court of Criminal Appeals, the petitioner contended that the denial of a lesser included offense instruction violated this Court's rule of law in Beck v. Alabama, 447 U.S. 625 (1980). The Court of Criminal Appeals in its decision, created an exception to the Beck requirement by stating the sole basis for the giving of a second degree

instruction would have been the statements of petitioner during his tape recorded conversation with a police informant. The court concluded that since the corpus delicti of the crime of Second Degree Murder had not been established independent of the statement, this Court's requirement in Beck that a jury be permitted to consider a verdict of guilt of a lesser included offense in a capital case as is constitutionally mandated, was not violated.

Petitioner also contended in his initial appeal to the Oklahoma Court of Criminal Appeals that the jury was limited in its consideration of mitigating circumstances in violation of Lockett v. Ohio, 438 U.S. 586 (1978) by virtue of the jury instruction which read:

> "You must avoid any influence or sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence."

The court held that this statement did not nullify mitigating circumstances because it was taken out of context and was found in a general instruction on the duty of the juror and that the jurors were properly instructed in a previous instruction, that they were not limited in their consideration to minimum mitigating circumstances but could consider any other mitigating circumstance they found existed from the evidence.

It was also contended by the petitioner on his direct appeal to the Oklahoma Court of Criminal Appeals that a jury instruction authorizing the jury to consider all evidence presented throughout the trial in determining what sentence the defendant should receive, violated a plurality of this Court in Gregg v. Georgia, 428 U.S. 153 (1976 opinion of Stewart, J., Powell, J. and Stevens, J. in that if failed to guarantee that the discretion afforded the sentencing body on a manner involving capital punishment must be suitably directed and limited as to minimize the risk of arbitrary and capricious action. Petitioner contended that this jury instruction

allowed the jury to consider and rely on in reaching its death verdict non-statutory aggravating circumstances which the subsequent appellant court would be unaware of and allowed the jury total and unbridled discretion to give a life sentence or a death penalty without meaningful guidelines in violation of the United States Supreme Court mandate in Gardner v. Florida, 430 U.S. 349.

> "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be and appear to be, based on reason rather than caprice or emotion."

The petitioner also contended on his direct appeal to the Oklahoma Court of Criminal Appeals that the jury's sentencing decision was arbitrary and capricious and that the sole aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution was not proven beyond a reasonable doubt. Petitioner contended that this Court's opinion in Godfrey v. Georgia, 446 U.S. 420 (1980) was violated by the application of this aggravating circumstance to the facts of the case. The petitioner contended that since the trial court held as a matter of law there is insufficient evidence to show that the murder resulted by the defendant attempting to escape from the commission of a felony, to-wit: the use of a false and bogus credit card, that a jury could not then come about and find the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. The defendant argued that since the Murder in the Second Degree instruction was denied by the trial judge, obviously there was not sufficient evidence to go to the jury on this issue and the court should have stricken the aggravating circumstance because it allowed the sentencing jury to base an opinion and give the death sentence arbitrarily and caprciously in light of this being the only aggravating circumstance found by the jury. The petitioner's argument was

brushed aside by the Oklahoma Court of Criminal Appeals in a one paragraph answer stating the argument was wholly without merit by virtue of this Court's clear mandate in Lockett v. Ohio, 438 U.S. 586 (1978) which authorizes the sentencer, in this case the jury, to consider not only the defendant's record and character, but any circumstances of the offense.

Petitioner finally argued on his brief to the Oklahoma Court of Criminal Appeals that the Court of Criminal Appeals' decision in Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980) created an unconstitutional mandatory imposition of death penalty once aggravating circumstances outweighed mitigating circumstances. The court in Irvin held:

> "The only discretion provided the jury under the statute is that necessary to make a factual finding of the existence or non-existence of aggravating and mitigating circumstances, as well as the discretion requisite in balancing the two."

The petitioner pointed out to the court that the trial court had failed to instruct the jury as to what would happen if mitigating circumstances did not outweigh aggravating circumstances and the obvious inference of the jury instruction on burden of proof is that if the aggravating circumstances were not outweighed by the mitigating circumstances, death was mandatory. The Oklahoma Court of Criminal Appeals brushed aside this argument by not addressing it. Rather, the court concluded that the Oklahoma statute provides objective standards to guide the jury in its sentencing decision; the jury is not required to recommend death even if it finds that one or more aggravating circumstances have been established beyond a reasonable doubt. Similar statutory schemes have been upheld by the Supreme Court in Gregg v. Georgia, 428 U.S. 153 and Proffitt v. Florida, 428 U.S. 242 (1976). The court failed to address the issue of why the death penalty was not mandatory if aggravating circumstances were outweighed by mitigating circumstances. This issue is in direct conflict with this

Court's decision in Woodson v. North Carolina, 428 U.S. 280 (1976) [Plurality Opinion].

Similarly, the Oklahoma Court of Criminal Appeals held that 21 O.S. 1976 Supp. §701.11 did not unconstitutionally shift the burden of proof to the appellant to prove sufficient mitigating circumstances to outweigh aggravating circumstances. The court stated that since the judge instructed in the second stage of the trial that the state was required to prove beyond a reasonable doubt at least one aggravating circumstance, that the fact that the burden of proof shifted to the defendant as to mitigating circumstances did not conflict with this Court's opinion in Mullaney v. Wilbur, 421 U.S. 684 (1975).

Unlike the statutory schemes approved by this Court in Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242, and Jurek v. Texas, 428 U.S. 262. The Oklahoma capital punishment statute as interpreted by the Oklahoma Court of Criminal Appeals does not allow the jury to choose once aggravating evidence is shown beyond a reasonable doubt to exist whether to impose the death penalty but mandatorily requires the jury to give the death penalty unless said circumstance is outweighed by mitigating circumstances. This interpretation amounts to a mandatory death penalty and is a mere papering over of the unguided jury discretion condemned by several members of this Court in Furman v. Georgia, 408 U.S. 238 (1972). Similarly, if the interpretation of the Oklahoma Court of Criminal Appeals is not in conflict with the Eighth and Fourteenth Amendments to the United States Constitution and mandatory death is permissible under this situation, surely said interpretation shifts the burden of proof to the petitioner in violation of Mullaney v. Wilbur. The particular interpretation of the Oklahoma Court of Criminal Appeals placed on the Oklahoma death penalty statute has a direct effect on approximately forty people currently on death row in the State of Oklahoma and may have a similar effect on other states who

may choose to follow the Oklahoma Court of Criminal Appeals' interpretation of a facially proper death penalty statute.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The petitioner through counsel, requested a Murder in the Second Degree instruction before the trial court. This instruction was denied by the trial court. Counsel for the petitioner took exception to the denial but did not specify that the Eighth and Fourteenth Amendments to the United States Constitution guaranteed him a right to this jury instruction. It should be noted that petitioner's trial was held approximately two years prior to this court's holding in Beck v. Alabama, 447 U.S. 625 (1980). It is believed that the decision in O'Connor v. Ohio, 385 U.S. 92 (1966), would excuse the failure to raise the question in the trial court under these circumstances.

On appeal to the Oklahoma Court of Criminal Appeals, this issue was presented in petitioner's original brief and this court's opinion in Beck was cited and argued as the basis of the error of the trial court.

The opinion in the Court of Criminal Appeals addresses the Beck issue on its merits and no comment was made nor any alleged by the State of failure by petitioner to raise this issue in the trial court.

2. No objection to the instruction limiting the jury's right to consider sympathy, sentiment or prejudice or other arbitrary factors was made at trial. This argument was raised on appeal and addressed on the merits by the Oklahoma Court of Criminal Appeals. The court, while holding that some other errors were waived by counsel's failure to object, issued an opinion on the merits as to this issue.

3. The petitioner did not object at trial to the jury instruction which told the jury they could consider all evidence introduced in the first and second stage of the proceedings in determining what punishment was appropriate. This argument was raised on appeal and argued to the Court of

Criminal Appeals that non-statutory aggravating circumstances were considered by the jury in reaching a death verdict, especially in light of the finding of only one aggravating circumstance by the jury. The Court of Criminal Appeals addressed this issue on the merits and the State did not allege that this error was waived by the failure to object by petitioner's attorney. Further this issue was raised again on rehearing in light of the statistical survey showing the Oklahoma Court of Criminal Appeals that this case was the only case out of approximately forty-five cases wherein this sole aggravating circumstance found by the jury resulted in a death penalty verdict. Rehearing was denied without opinion on this statistical argument advanced for the first time on petitioner's rehearing petition.

4. This issue arises for the first time on appeal by virtue of the Oklahoma Court of Criminal Appeals' holding that this aggravating circumstance was supported by sufficient evidence. Counsel for petitioner initially offered a murder in the second degree instruction which was rejected by the trial court. The court's decision stating that the evidence supported this statutory aggravating circumstance was addressed on the merits by the Court of Criminal Appeals.

This issue results from an appellate interpretation of the Oklahoma Capital Punishment statute which is clearly at odds with the plurality opinion of Justices Stewart, Powell and Stevens in Gregg, supra. It was raised for the first time on appeal after the Oklahoma Court of Criminal Appeals came down with its decision in Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980) and was addressed on the merits by the Oklahoma Court of Criminal Appeals.

REASONS FOR GRANTING THE WRIT

In upholding the conviction of the petitioner, the Oklahoma Court of Criminal Appeals disposed of federal constitutional questions in a way which fundamentally miscontrues previous decisions of this court. The Oklahoma Court of Criminal Appeals has similarly created new exceptions to the requirements placed on capital sentencing announced by this court in Gregg v. Georgia, 428 U.S. 153 (1976) [Opinion of Stewart, J., Powell, J. and Stevens, J.); Woodson v. North Carolina, 428 U.S. 280 (1976), Gardner v. Florida, 430 U.S. 349 (1977) and Eddings v. Oklahoma, 453 U.S. ____ 102 S.Ct. 869 (1982), (O'Connor J. concurring) and Beck v. Alabama, 447 U.S. 625 (1980). The interpretation placed on their facially constitutional capital sentencing statute by the Oklahoma Court of Criminal Appeals creates serious problems concerning capital sentences and trials of capital cases in the State of Oklahoma.

I.

THIS COURT SHOULD GRANT CERTIORARI TO PREVENT THE OKLAHOMA COURT OF CRIMINAL APPEALS FROM CIRCUMVENTING THE CONSTITUTIONALLY MANDATED REQUIREMENT THAT A JURY BE GIVEN AN OPTION OF CONVICTING A DEFENDANT ON A LESSER INCLUDED OFFENSE WHERE EVIDENCE SUPPORTS SUCH A FINDING.

In Beck v. Alabama, 447 U.S. 625 (1980), this Court held that a jury must be given an option of convicting a defendant of a lesser included offense in a capital trial where the evidence supports it as a matter of federal constitutional law under the Eighth and Fourteenth Amendments to the United States Constitution. The Oklahoma Court of Criminal Appeals attempts to circumvent this constitutional mandate created by this court in Beck by stating there was insufficient evidence of a corpus delicti of the crime independent of the statement of the defendant and that while the defendant's statement was

admissible in the trial of the matter, said evidence could not go toward an instruction on murder in the second degree. Petitioner contends that the same factors underlying this Court's holding in Beck apply with equal force to this Oklahoma created exception to Beck.

II.

THIS COURT SHOULD GRANT CERTIORARI TO PREVENT THE OKLAHOMA COURT OF CRIMINAL APPEALS FROM CONTINUING TO APPROVE JURY INSTRUCTIONS WHICH LIMIT MITIGATING CIRCUMSTANCES.

Lockett v. Ohio, 438 U.S. 586 (1978) allows for the sentencer in all but the rarest kinds of capital cases be allowed to consider anything in mitigation of punishment. Petitioner in the instant case contended on direct appeal that the preclusion of the jury from considering sympathy, sentiment, passion or prejudice or any arbitrary factor in reaching their decision on life and death restricted mitigation in violation of Lockett. Despite the obvious problem, the Oklahoma Court of Criminal Appeals has had with limiting mitigating circumstances (See generally Eddings v. Oklahoma, 453 U.S. ___ 102 S.Ct. 869 (1982) the court held that this jury instruction did not nullify the court's earlier instruction concerning mitigation. Webster's New World Dictionary, Second College Edition defines sympathy as being and entering into or the ability to enter into, another person's mental state, feelings, emotions, pity or compassion felt for another's troubles or sufferings. Not allowing the jury to consider these factors in determining whether one deserves life or death is a substantial denial of a federal constitutional right.

III.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE OKLAHOMA COURT OF CRIMINAL APPEALS' DECISION APPROVING A JURY INSTRUCTION WHICH ALLOWS THE JURY TO CONSIDER NON-STATUTORY AGGRAVATING CIRCUMSTANCES IN DETERMINING LIFE OR DEATH.

The Oklahoma Court of Criminal Appeals in approving a jury instruction authorizing the jury to consider all evidence both at the first and second stages of the trial in determining the appropriate punishment and not limiting the instruction to a consideration of the evidence which goes to statutory aggravating circumstances or mitigating circumstances allowed the jury to consider any factor it so chose in determining life or death. This court has currently granted certiorari in Barclay v. Florida, 81-6908. One of the issues raised in the Barclay petition was the use of non statutory aggravating circumstances in justifying a death penalty verdict. While in petitioner's case the sentencer, the jury under Oklahoma law, did not specify what circumstances it relied on in rendering the death penalty outside of the statutory aggravating circumstances. It was instructed that it could consider any factor it so chose in arriving at its verdict in the case. Petitioner also points out that the Oklahoma Court of Criminal Appeals in denying this claim construes this Court's opinion in Lockett v. Ohio, supra, to allow all evidence received in a trial admissible for determining a death penalty verdict. This action circumvents the plurality opinion of Justices Stewart, Powell and Stevens in Gregg v. Georgia, 428 U.S. 153 requiring that the death penalty be imposed in a way that minimizes the risk of arbitrary and capricious action. See also Eddings v. Oklahoma, surpa. (O'Connor J. concurring).

IV.

THIS COURT SHOULD GRANT CERTIORARI TO STOP STATE APPELLATE COURTS FROM RUBBER STAMPING FINDINGS OF AGGRAVATING CIRCUMSTANCES IN CAPITAL CASES.

The jury in the instant case was instructed that they had to find one aggravating circumstance before they were authorized to consider the death penalty. Though the jury failed to find the defendant had a probability of future acts of violence which would constitute a continuing threat to society or the offense was cruel, heinous and atrocious, it sentenced petitioner to death on a finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. The Oklahoma Court of Criminal Appeals approved this finding while in the same breath, holding they were not constitutionally required to furnish petitioner with a jury instruction that stated the murder existed while the petitioner was in the commission of the use of a stolen credit card, a lesser included offense under the laws of the State of Oklahoma. 21 O.S. §701.8.

The rubber stamping of this aggravating circumstance demonstrates the inadequacy of the appeal review of death sentences by the Oklahoma Court of Criminal Appeals. As urged on rehearing in petitioner's case of the approximately forty-seven people receiving death sentences in the State of Oklahoma, no one had received the death sentence based solely on the finding of this aggravating circumstance. Further, approximately 90% of the people who received the death penalty had either the aggravating circumstance cruel, heinous and atrocious or probability of future acts of violence which would constitute a continuing threat to society. (Appendix One of Petitioner's brief on his petition for rehearing). Obviously, this rubber stamping of aggravating circumstances minimizes this Court's opinion in Godfrey v. Georgia preventing standardless sentencing discretion of juries to be approved by

appellate courts as was done in this instant case. This Court should grant certiorari to determine the proper scope of appellate review of aggravating circumstances and in generally, the verdict of death.

V.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE CONSTITUTIONALITY OF THE OKLAHOMA DEATH PENALTY STATUTE AS INTERPRETED BY THE OKLAHOMA COURT OF CRIMINAL APPEALS.

The Oklahoma Court of Criminal Appeals, in interpreting the meaning of the Oklahoma Death Penalty statute, in Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980), held:

> "The only discretion provided the jury under the statute is that necessary to make a factual finding of the existence or non-existence of aggravating and mitigating circumstances, as well as the discretion requisite in balancing the two."

In the instant case, petitioner's jury was authorized three courses of action. The first of these is that the jury was not authorized to consider the penalty of death unless one or more aggravating circumstances existed beyond a reasonable doubt. The second possible authorization is if one or more of the aggravating circumstances existed beyond a reasonable doubt and the jury was authorized to consider imposing a death sentence. The final choice the jury had was if they found the aggravating circumstances were outweighed by one or more mitigating circumstances, then the death penalty shall not be imposed and the sentence shall be light.

The jury was not told what would happen if the aggravating circumstances were not outweighed by mitigating circumstances but logically one would infer the death penalty must be imposed in such a situation based on the court's instruction.

In holding this statute mandatory unless mitigating circumstances outweigh aggravating circumstances as the Court

of Criminal Appeals did in Irvin, requires the defendant to come forward with evidence in mitigation where death is mandatory. This clearly shifts the burden of proof to the defendant to prove he should live. This burden shifting in a capital case where the reliability of the sentencer's decision is critical. Gardner v. Florida, 430 U.S. 349. violates the Eighth and Fourteenth Amendments to the United States Constitution.

This Court in Gregg, supra, and Proffitt, supra, approved similar statutory schemes of the states of Georgia and Florida. However in the plurality opinion of Justices Stewart, Powell and Stevens in Gregg and Proffitt, neither state supreme court had interpretated the statute to be mandatory once mitigating circumstances did not outweigh aggravating. Georgia, pursuant to statutory scheme, allows the jury to recommend mercy which was recognized by the plurality opinion in Gregg at 428 U.S. 197 and as in this statutory makeup of the Georgia capital statute, §26-3102 supp. 1975. Further in Proffitt, this Court pointed out that aggravating and mitigating circumstances are used to assist the sentencer in making his determination. 428 U.S. at 253 (Emphasis Added). Oklahoma has eliminated the element of mercy in its mandatory interpretation of its statute and has papered over the unbridled discretion of juries by such interpretation.

CONCLUSION

For the reasons stated above, the petitioner requests a writ of certiorari be granted.

Respectfully submitted,

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mandatory provision of the statute which vests the district attorney with the duty to prosecute paternity actions was intended to provide counsel for the mother at the expense of the state as well as to protect the state's interest in preventing the child from becoming a public charge. The statute was not intended to deprive the mother of any of her interests in the proceeding.[7]

In *Harley v. Ionia Circuit Judge*, 140 Mich. 642, 104 N.W. 21, 22 (1905) the Michigan Supreme Court interpreted a similar statute [Mich.Comp.Laws § 2556][8] The statute required prosecuting attorneys to appear in all civil or criminal cases in which the state or county had an interest. The court said:

> " The statute wisely provides against the contingency of such a child becoming a public charge, but it recognizes that the complainant is interested, and must also be protected. To properly protect the interests of a minor under such circumstances by the employment of counsel would appear not only to be a right, but the duty, of a parent or guardian. The prosecuting attorney representing the people and the attorney representing the complainant do not represent conflicting interests, nor is the complainant's attorney in any sense an assistant prosecutor. "

The defendant has failed to cite a case in point to support his contention and our research has revealed only contrary authority. We hold that: it was the legislative intent that the district attorney control and prosecute paternity proceedings, this duty cannot be relinquished in favor of private counsel; under the facts of this case, the mother-complainant was entitled to representation by private counsel, and there was no showing of prejudice to the appellant.

AFFIRMED.

All the Justices concur.

Harley v. Ionia Circuit Judge, 140 Mich. 642, 104 N.W. 21 (1905).

See also Uniform Parentage Act § 19 which permits each party to be represented by counsel regardless of financial circumstances.

7. See *State v. Chicko*, *id.*; *State v. Sax*, *id.*

Robyn LeRoy PARKS, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-79-3.

Court of Criminal Appeals of Oklahoma.

Aug. 26, 1982.

Rehearing Denied Sept. 28, 1982.

Defendant was convicted in the District Court, Oklahoma County, Joe Cannon, J., of murder in the first degree and he appealed. The Court of Criminal Appeals, Brett, P.J., held that: (1) defendant was not entitled to instruction on lesser included offense of second-degree murder; (2) trial court properly admitted tape recordings of conversation between defendant and another person; (3) corpus delicti was sufficiently established to permit introduction of confession; (4) trial court's voir dire of jurors concerning death penalty was proper; (5) trial court's instruction on the death penalty were proper; and (6) evidence sustained jurors' determination that the murder was committed to avoid arrest or prosecution.

Affirmed.

1. Criminal Law ⇐795(2)

Defendant is entitled to have an instruction on a lesser included offense where the evidence warrants it.

2. Homicide ⇐285

Tape recorded statement in which defendant indicated that he had been attempting to use fraudulent credit card to purchase gasoline when he killed the service

8. The Michigan statute, Mich.Comp.Laws § 722.714(c), was last amended in 1962 and it now requires the mother to employ private counsel unless she is eligible for public assistance.

station attendant was insufficient, by itself, to warrant instruction on second-degree murder on theory that defendant had murdered the victim while committing the felony of using a fraudulent credit card. 21 O.S. 1981, §§ 701.8, subd. 2, 1550.22.

3. Criminal Law ⇐563

State must prove the corpus delicti beyond a reasonable doubt by evidence other than a confession.

4. Criminal Law ⇐563

The "corpus delicti" is the actual commission of a particular crime by someone; it may be established without showing that the offense charged was committed by the accused.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐517.3(4)

Testimony of police and medical examiner to the effect that victim had been found shot to death was sufficient to establish corpus delicti of homicide so as to render defendant's confession admissible.

6. Criminal Law ⇐814(17)

Tape-recorded conversations in which defendant admitted that he committed the crime provided direct evidence linking defendant to the crime so that trial court was not in error in limiting circumstantial evidence instruction to the issue of malice aforethought.

7. Criminal Law ⇐824(9)

When evidence is both direct and circumstantial, it is not error to fail to give circumstantial-evidence instruction when none is requested.

8. Jury ⇐131(17)

Trial court which asked jurors whether they could impose the death penalty without doing violence to their conscience if the law and evidence warranted the death penalty, which asked any juror who responded in the negative whether reservations about the death penalty were such that, regardless of the law, the facts and the circumstances, he would not inflict the death penalty and which dismissed jurors who responded in the affirmative to the second question properly questioned the jurors on that issue.

9. Jury ⇐33(2.1)

Dismissal of jurors who said that they could not impose the death penalty without doing violence to their conscience and that they would not inflict the death penalty regardless of the law, the facts and the circumstances of the case did not deny defendant a jury representing a cross section of the community.

10. Jury ⇐108

Sentence of death cannot be carried out if jury which recommends it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

11. Criminal Law ⇐789(2)

Trial court which told the jury that no one was going to tell them what reasonable doubt was, that there was a higher degree of proof required in a criminal case than in a civil case, and that the preponderance of the evidence standard did not apply did not improperly attempt to define reasonable doubt.

12. Criminal Law ⇐394.3

One who voluntarily enters into a conversation with another takes a risk that that person may record the conversation and the prohibition against unreasonable searches and seizures did not prevent admission of tape conversations into evidence where one party consented to the taping. U.S.C.A.Const.Art. 2, § 30.

13. Witnesses ⇐337(6)

Where there had never been a determination that defendant's prior robbery conviction was unconstitutionally obtained, defendant could not collaterally attack that conviction when it was offered to impeach him at his subsequent murder trial. 12 O.S. 1981, § 2609; 22 O.S. 1981, § 1080 et seq.

14. Criminal Law ⇐1030(1)

Absent fundamental error, Court of Criminal Appeals will not consider allegations of error not objected to at trial.

15. Criminal Law ⇐986.6(3)

Photograph of victim at the scene of the crime was properly offered during the sentencing phase in order to prove the aggravating circumstance that the offense was especially heinous, atrocious and cruel.

16. Criminal Law ⇐728(5)

When an objectionable statement is made by a prosecuting attorney, defense counsel must object and request that the jury be admonished to disregard that statement; if that is not done, defendant is deemed to have waived any objection unless the remarks are fundamentally prejudicial.

17. Criminal Law ⇐1177

Prosecuting attorney's closing argument during the sentencing phase to the effect that he could not find a single, solitary mitigating circumstance that would offset any of the aggravating circumstances was not fundamentally prejudicial.

18. Criminal Law ⇐1208(1)

If jury does not find unanimously beyond a reasonable doubt that one or more of the statutory circumstances existed, they are not authorized to consider the penalty of death and the sentence would automatically be imprisonment for life.

19. Criminal Law ⇐986.6(1)

Trial court's instruction in sentencing phase to effect that the jurors were to avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence did not nullify the trial court's instruction concerning mitigation.

20. Criminal Law ⇐986.6(1)

Jury is not required to recommend death even if it finds one or more aggravating circumstances have been established beyond a reasonable doubt. 21 O.S. 1981, § 701.11.

21. Criminal Law ⇐1206(1)

Oklahoma death penalty statute does not unconstitutionally shift the burden of proof to the defendant to prove sufficient mitigating circumstances to outweigh the aggravating circumstances.

22. Criminal Law ⇐986.6(1)

Trial court properly instructed jury at sentencing phase that they were authorized to consider all the evidence presented throughout the trial in determining what sentence defendant should receive.

23. Criminal Law ⇐986.6(3)

Evidence of tape recording on which defendant stated that he killed gas station attendant because he was afraid the gas station attendant would report him to the police for using a stolen credit card clearly established the defendant's state of mind and was sufficient evidence on which jury could find the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

24. Criminal Law ⇐1206(1)

Oklahoma death penalty statute is not unconstitutional on theory that the state has failed to show that the state's interest involved could not be gratified by less drastic means.

25. Criminal Law ⇐1213

Oklahoma death penalty statute does not inflict cruel or unusual punishment.

26. Criminal Law ⇐1206(2)
Homicide ⇐354

Sentence of death imposed upon defendant who was convicted of killing gas station attendant and found to have done so in order to avoid arrest or prosecution for using a stolen credit card was not imposed under the influence of passion or prejudice and was not excessive or disproportionate to the penalty imposed in similar cases. 21 O.S. 1981, § 701.13.

An appeal from the District Court, Oklahoma County, Joe Cannon, District Judge.

Robyn LeRoy Parks, appellant, was convicted of Murder in the First Degree in Oklahoma County District Court, Case No. CRF 77 3159. He was sentenced to death and appeals. AFFIRMED.

Robert A. Ravitz, Asst. Public Defender, Oklahoma City, for appellant.

Jan Eric Cartwright, Atty. Gen., State of Oklahoma, Susan Talbot, Asst. Atty. Gen., Chief, Appellate Criminal Division, Oklahoma City, for appellee.

OPINION

BRETT, Presiding Judge:

Robyn LeRoy Parks was found guilty of Murder in the First Degree pursuant to Laws 1976, ch. 1, § 1, now 21 O.S.1981, § 701.7 in the District Court of Oklahoma County, Case No. CRF 77 3159. Subsequent to a hearing on aggravating and mitigating circumstances, the jury voted to impose the death penalty.

At approximately 4:30 a. m. on August 17, 1977, the victim, Abdullah Ibrahim was found shot to death on the floor of the Gulf Service Station where he was employed. An unused charge slip bearing various notations on both the front and back, which was apparently used as a scratch pad to compute the customers' purchases and figure tax, was found at the scene of the homicide by an investigating police officer. This same charge slip also had a license tag number written across the front of it, XZ-5710. It was subsequently determined that the owner of the vehicle bearing that license tag number was Robyn LeRoy Parks.

On August 29 and 30, 1977, James Clegg, an informant, allowed representatives of the State to tape two phone conversations that Clegg had with the appellant who was then in San Pedro, California. During the course of the August 29th telephone conversation, Parks told Clegg that he shot Abdullah Ibrahim because Ibrahim had written down his tag number and Parks was afraid Ibrahim would call the police when he realized Parks' credit card was hot. During the August 30th phone conversation, Parks revealed the location of the gun that he used to shoot the victim. At that location, a .45 calibre pistol in a holster and a box of .45 calibre ammunition was found by Clegg who was accompanied by a police detective.

Robyn Parks testified in his own defense that the answers he gave on the two tapes were not true, that he had made the incriminating statements in order to protect his family from further harassment. He claimed that on an earlier day he had obtained gas at the station and because he did not have the money with which to pay, the attendant wrote down his license tag number. He returned the same night to pay for the gas. He further testified that on the night of the murder, he had stayed at the home of Elaine Sheets.

During the second stage of the trial, the State offered three aggravating circumstances to justify imposition of the death penalty. In mitigation, the State offered the testimony of Robyn Parks' father. The jury found one aggravating circumstance, that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

Error is first alleged in the trial judge's refusal to allow an instruction on the offense of Murder in the Second Degree pursuant to Laws 1976, ch. 1, § 2, now 21 O.S.1981, § 701.8(2). The desired instruction would have allowed the jury to determine, based on the evidence, that the appellant murdered the victim while the appellant was committing the felony of using a fraudulent credit card in violation of Laws 1981, ch. 86, § 4, now 21 O.S.1981, § 1550.22.

[1] Both parties agree that a defendant is entitled to have an instruction on a lesser included offense where the evidence warrants it. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); 22 O.S.1971, § 916. The trial court determined as a matter of law that the evidence was insufficient in the present case to allow the jury to find that the appellant was using a fraudulent credit card, thus there could be no justification for a finding of second degree murder.

[2] The sole evidence offered to the jury to support a finding that the appellant was using a fraudulent credit card was the appellant's own statement made during the tape recorded conversation with the informant, Clegg. Aside from that statement,

no other evidence was ever introduced to show credit card use, such as a credit card receipt for gasoline, or any evidence of a credit card or of missing gasoline.

We agree that the trial judge was correct in not allowing an instruction on second degree murder. Judge Cannon stated:

> As a matter of fact, the defendant's own testimony was that he didn't even own a credit card. But even in the State's case there was no evidence of a credit card, except his statements and his statement alone does not prove the corpus delecti of the crime. There is no corpus delecti of any other felony having been committed.
>
> There is no evidence of it and, consequently, it's Murder One or nothing. (Tr. 543)

See also, *DeLaune v. State*, 569 P.2d 463 (Okl.Cr.App.1977) quoting *Hall v. State*, 538 P.2d 1113, 117 (Okl.Cr.App.1975):

> The general rule is that in every criminal prosecution the burden rests on the State to prove the corpus delecti beyond a reasonable doubt. This must be proven by evidence other than a confession, the confession being admissible merely for the purpose of connecting the accused with the offense charged.

Because there was no evidence to support a lower degree of the crime charged or an included offense, it was not only unnecessary to instruct on second degree murder, but the court had no authority to ask the jury to consider the issue. *Irvin v. State*, 617 P.2d 588 (Okl.Cr.App.1980), *Rogers v. State*, 583 P.2d 1104 (Okl.Cr.App.1978).

[3] In a supplemental brief, the appellant alleges that his conviction for first degree murder cannot be sustained for the reasons that his tape recorded statements were not corroborated by independent proof of the corpus delecti. We agree, as we have already stated, that the State must prove the corpus delecti beyond a reasonable doubt by evidence other than a confession. *DeLaune v. State*, supra. The appellant acknowledges that evidence introduced by the State established that a homicide was committed, but argues there was insufficient proof of the corpus delecti to corroborate his confession since no evidence was presented connecting him with the actual commission of the offense independent of his statements.

[4] This contention misconstrues the definition of corpus delecti and the extent of the proof the State introduced to connect the appellant to the crime. The "corpus delecti" means the actual commission of a particular crime by someone. *Bond v. State*, 90 Okl.Cr.App. 110, 210 P.2d 784 (1949). The corpus delecti may be established without showing that the offense charged was committed by the accused. *Webb v. State*, 550 P.2d 1360 (1976).

[5] In the present case, the testimony of the police and the medical examiner established that a homicide was committed, and the State therefore clearly established the corpus delecti by evidence independent of appellant's statements. Further evidence introduced by the State in the form of the credit card slip bearing the appellant's license tag number was sufficient to link the appellant to the corpus delecti of the crime. We therefore conclude that the evidence is sufficient to sustain the conviction and this proposition is without merit.

[6] Secondly, the appellant contends that the trial court committed fundamental error by limiting the circumstantial evidence instruction to cover only the issue of malice aforethought. He argues that because there was a complete lack of any direct evidence to show he was connected to the crime, a general circumstantial evidence instruction should have been given. However, the tape-recorded conversations introduced at trial, in which the appellant admitted that he committed the crime, provided direct evidence linking the appellant to the crime.

[7] Also, no objection was made at the time the instructions were given, nor was an alternative instruction offered. When the evidence is both direct and circumstantial, it is not error to fail to give a circumstantial evidence instruction when none is requested. *Grimmett v. State*, 572 P.2d 272

(Okl.Cr.App.1977). Therefore, the trial court did not commit error by failing to provide a general circumstantial evidence instruction.

The third and fourth propositions of error contend that the trial court violated the appellant's Sixth and Fourteenth Amendment rights by excusing six jurors for cause because of their opposition to the death penalty. It is first alleged that the trial court failed to fully inquire of these six jurors whether they could consider the death penalty as required by the juror's oath. The appellant argues that this failure to inquire violated the holding of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). There, the United States Supreme Court recognized that the State might not exclude jurors because of their views on the death penalty unless " they could never vote to impose the death penalty or they would refuse even to consider its imposition in the case before them." 391 U.S. 510, at 512, 88 S.Ct. 1770 at 1772.

[8] In the present case, the trial judge asked each juror the following question:

> In a case where the law and evidence warrant, in a proper case, could you without doing violence to your conscience, agree to a verdict imposing the death penalty?

If a juror responded in the negative, the judge would then ask:

> If you found beyond a reasonable doubt that the defendant was guilty of murder in the first degree and if under the evidence, facts and circumstances of the case, the law would permit you to consider a sentence of death, are your reservations about the death penalty such, that regardless of the law, the facts and circumstances of the case, you would not inflict the death penalty.

If a juror answered yes to this, then the trial judge excused that juror for cause. It is our determination that this line of questioning and the resulting dismissal for cause did not violate *Witherspoon*. The trial court's questioning resulted in the determination that the juror, regardless of the law, facts or circumstances would never inflict the death penalty and this is exactly what the Supreme Court in *Witherspoon* held to be the correct standard to allow dismissal of a juror for cause.

[9] The appellant also claims that the dismissal of these six jurors denied him a jury which represented a cross section of the community.

[10] He cites *Witherspoon*, supra, to support the contention that it is the proper duty of the jury to express community attitudes about punishment. The appellant is correct that *Witherspoon*, supra, does stand for the proposition that a sentence of death could not be carried out where the jury that recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. However, the Supreme Court in that case determined that the appellant's right to representation by a fair cross-section of the community stopped there and did not extend so far as to require the inclusion of persons on the jury who could never vote to impose the death penalty or would refuse even to consider its imposition. Therefore, the appellant's argument is without merit.

The appellant claims in his fifth proposition of error that during voir dire, the trial court while trying to explain the difference between a civil case and a criminal case, defined reasonable doubt. The judge stated:

> No one's going to tell you what reasonable doubt is. Its got to be beyond a reasonable doubt. There's a higher degree of proof required in a criminal case before you could find someone guilty than in a civil case. Go back to those scales, ladies and gentlemen. If you have those scales that are even, and in a civil case you tip them in favor of the plaintiff by preponderance of the evidence. But in a criminal case, there has to be a greater one. Exactly where, is up to you, but you have to be beyond a reasonable doubt before you can find a defendant

guilty. That's the law of all fifty states. That's the law of Oklahoma and the Federal government.

[11] This Court has repeatedly held that an attempt to define "reasonable doubt" to a jury by the trial judge is reversible error. *Jones v. State*, 554 P.2d 830 (Okl.Cr.App. 1976). However, nowhere in the remark of which the appellant complains did the trial court actually give a definition of "reasonable doubt." Therefore, no error occurred. See, *Miller v. State*, 567 P.2d 105 (Okl.Cr. App.1977).

[12] Next, the appellant asserts two errors occurred with respect to the taped telephone conversations admitted into evidence. He argues that the Oklahoma constitutional provision, Article II, § 30, against unreasonable searches and seizures prevents the admission of taped conversations into evidence even though one party consented to the taping. He further alleges, that it was error for the jury to have been provided also with typewritten copies of the tape recorded conversation because this resulted in a violation of the "best evidence" rule.

We cannot agree with either contention. One who voluntarily enters into a conversation with another takes a risk that that person may record the conversation. Once one party consents to record a conversation, the conversation is divested of its private character. *Pearson v. State*, 556 P.2d 1025 (Okl.Cr.App.1976). We therefore conclude that because Mr. Clegg consented to the taping of the conversations, no violation of the appellant's right to privacy as contemplated by Article II, § 30 of the Oklahoma Constitution occurred.

In addition, the jury did listen to the actual tapes made of the conversations, therefore the "best evidence" rule, 12 O.S. 1981, § 3001, was not violated. The appellant has cited no relevant authority for his assertion that it was error for the jury to also receive typed copies of the conversations on the tapes, for this reason, the alleged error will not be considered. *Dick v. State*, 586 P.2d 1265 (Okl.Cr.App.1979).

When the appellant was seventeen years old, he was convicted of Robbery by Force or Fear. In proposition of error number nine the argument is made that the State should not have been allowed to use this prior conviction to impeach the appellant because the appellant had not been certified to stand trial as an adult before he was convicted.

[13] A determination that the prior robbery conviction was unconstitutionally obtained has never been made, nor is this the proper place for the appellant to collaterally attack that conviction. See 22 O.S. 1981, §§ 1080 et seq. Therefore, no error occurred when the State used the appellant's prior conviction for purposes of impeachment pursuant to 12 O.S.1981, § 2609.

Following the jury's determination that the appellant was guilty of Murder in the First Degree, a separate sentencing proceeding was held in accordance with 21 O.S.1981, § 701.10. The remaining part of this opinion concerns error that allegedly occurred during this second portion of the trial.

[14] It is first argued that error occurred when the court allowed William David Boren and William Boren to testify about the specific facts concerning the defendant's conviction for Robbery by Force and Fear and to identify a picture of William David Boren as being the picture of his face after he was beaten by Parks during the robbery. The appellant asserts that this testimony was outside the scope of rebuttal and introduced solely to effect the passions and prejudices of the jury. However, no objection was made at any time by defense counsel to the presentation of this evidence. Absent fundamental error, this Court will not consider allegations of error not objected to at trial. *Gaines v. State*, 568 P.2d 1250 (Okl.Cr.App.1977).

[15] Next, the appellant asserts that the admission of a photograph of the victim at the scene of the crime was error because it may have been the cause of the jury's returning the death penalty. This picture

was admitted during the second stage of the proceeding in order to prove the aggravating circumstance that the offense was especially heinous, atrocious and cruel. This Court has repeatedly said that when the probative value of a picture is outweighed by its prejudicial impact on the jury it will not be permitted into evidence. *Oxendine v. State*, 335 P.2d 940 (Okl.Cr.App.1958). Further, the weighing of these factors is left to the sound discretion of the trial court and absent an abuse of discretion it will not be disturbed on appeal. *Boling v. State*, 341 P.2d 668 (Okl.Cr.App.1959). The photograph was relevant to the issue for which it was introduced. In view of the fact that the jury, after viewing the photo, failed to find the aggravating circumstance that the crime was especially heinous, atrocious and cruel, no abuse of discretion is apparent.

Third, the appellant alleges that the prosecutor made improper remarks during the closing argument that denied the appellant a fair trial. The appellant complains that the prosecutor interjected his personal opinion when he stated: "So looking at it from both sides, I can't find a single, solitary mitigating circumstance that would offset any of the aggravating circumstances." Further, it is argued the prosecutor committed error by stating that in assessing the death penalty each juror was not personally putting Robyn Parks to death, by commenting on how the death penalty is effectuated in Oklahoma County, by telling the jury to leave sympathy, sentiment and prejudice out of their deliberation and by commenting on the deterrent value of the death penalty.

[16, 17] We have repeatedly held that when an objectionable statement is made by a prosecuting attorney, defense counsel must object and request that the jury be admonished to disregard the statement. *Tahdooahnippah v. State*, 610 P.2d 808 (Okl.Cr.App.1980). When this is not done the appellant is deemed to have waived any objection, unless the remarks are fundamentally prejudicial. *Bruner v. State*, 612 P.2d 1375 (Okl.Cr.App.1980). Because defense counsel did not object to these remarks at the time the prosecutor made them, and we find no fundamental prejudice occurred as a result, this proposition of error is without merit.

[18] Error is also alleged in various instructions given by the trial judge. It is argued that the statement in the last instruction, "Your verdict must be unanimous. Proper forms of verdict will be given you which you shall use in expressing your decision" was erroneous because it required the jury to come back with a verdict and did not explain to them that if they could not agree reasonably to a verdict they must come back with a verdict of life imprisonment. However, it is the appellant's brief and not the trial judge's instructions that incorrectly states the law. In Oklahoma, the jury in a criminal case is required to reach a unanimous verdict. See, 22 O.S. 1981, § 921. As was properly stated in Instruction No. 7, if the jury does not find unanimously beyond a reasonable doubt one or more of the statutory circumstances existed, they would not be authorized to consider the penalty of death, and the sentence would automatically be imprisonment for life. The authority for this statement is found in 21 O.S.1981, § 701.11: "If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life." Therefore no error occurred in this instruction.

The appellant also argues that the jury instructions rendered the Oklahoma Death Penalty Statute unconstitutional as applied for five reasons.

[19] In Part A of this five part argument, the appellant objects to the statement found in Instruction No. 9, "You must avoid any influence or sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." He argues that this statement nullified the court's earlier instruction to the jury concerning mitigation. We do not agree. The statement complained of is taken out of context. It is found in the final instruction to the jury which was a general instruction on the duty

of jurors. The particular paragraph in which the statement is found explained to the jurors that each must determine the importance and weight of the evidence himself and discharge his duty as a juror "impartially, conscientiously and faithfully ... and return such verdict as the evidence warrants when measured by these Instructions."

Instruction No. 6, on the other hand, clearly explained to the jurors that they were not limited in their consideration to the minimum mitigating circumstances set out by the court, but could consider any other mitigating circumstances that they found existed from the evidence. We therefore see no conflict between the two instructions.

[20] Part B of this proposition of error appears to argue that the Oklahoma statute, 21 O.S.1981, § 701.11, interpreted by this Court in *Irvin v. State*, 617 P.2d 588 (Okl.Cr.App.1980), creates an unconstitutional mandatory imposition of the death penalty once aggravating circumstances outweigh mitigating circumstances. It is not surprising that the appellant's argument is unsupported by relevant authority. It is true that the Supreme Court struck down North Carolina's death penalty statute[1] because it made the imposition of the death penalty mandatory once first-degree murder was found. On the contrary, the Oklahoma statute provides objective standards to guide the jury in its sentencing decision, the jury is not required to recommend death even if it finds that one or more aggravating circumstances have been established beyond a reasonable doubt. Similar statutory schemes have been upheld by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

It is argued in Part C that the trial judge did not adequately explain to the jury the purposes for which they were to use mitigating circumstances or how the mitigating circumstances should be weighed in relation to the aggravating circumstances. There is no indication in the record that the appellant objected to the instructions he now complains of, or offered any alternative instructions. Where such is the case, this Court deems the error waived unless the accused was deprived of a substantial right due to the failure to instruct upon a material or fundamental question of law. *Lackey v. State*, 529 P.2d 994 (Okl.Cr.App.1974). We have reviewed the instructions on mitigating and aggravating circumstances and find they were sufficient to inform the jury of their duty in deciding whether to impose a sentence of death or life imprisonment.

[21] Part D alleges that 21 O.S.1981, § 701.11 unconstitutionally shifts the burden of proof to the appellant to prove sufficient mitigating circumstances to outweigh the aggravating circumstances. We find that the statutory language requiring the defendant to come forward with evidence of mitigating circumstances does not impermissibly shift the burden of proof to the defendant in contravention of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). In the guilt stage of the trial, the jury was instructed that the burden was on the State to prove beyond a reasonable doubt every element of first degree murder. The judge also instructed in the second stage of the trial that the State was required to prove beyond a reasonable doubt at least one aggravating circumstance. Therefore, we find the appellant's contention to be without foundation.

[22] Lastly, the appellant contends that error resulted in the giving of part of Instruction No. 9 which advised the jury that they were authorized to consider all evidence presented throughout the trial in determining what sentence the defendant should receive. The argument is wholly without merit in view of the U.S. Supreme Court's clear mandate in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which authorized the sentencer, in this case the jury, to consider not only the defendant's record and character, but any circumstances of the offense

1. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

[23] In Proposition of Error Number Fifteen, the appellant argues that insufficient evidence existed to allow the jury to find the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. This argument lacks merit because of our previous decision in *Eddings v. State*, 616 P.2d 1159 (Okl.Cr.App.1980), remanded for resentencing ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), wherein we stated that "It is important to realize that the focus of this aggravating circumstance is on the state of mind of the murderer. It is the murderer who must have the purpose of 'avoiding or preventing a lawful arrest or prosecution.'" *Eddings v. State*, *supra*, at 1169. The evidence presented by the State in the taped telephone conversation between the appellant Clegg and Parks clearly established Parks' state of mind.[2] Therefore the jury had ample evidence on which to find the aggravating circumstance and no error occurred.

[24, 25] Lastly, the appellant contends that the Oklahoma death penalty is unconstitutional because the State has failed to show that the death penalty fulfills a compelling state interest which cannot be gratified by less drastic means and because the death penalty constitutes cruel and unusual punishment. Both of these issues have been addressed and rejected by the U.S. Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). There the court upheld the Georgia death penalty statute and in addition to finding that the death penalty did not constitute cruel and unusual punishment in violation of the Eighth Amendment, also stated that:

> We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.

In accord with the Supreme Court decisions in *Gregg v. Georgia*, *supra*, and *Proffitt v. Florida*, *supra*, we find that the Oklahoma death penalty statute is constitutional.

[26] In addition to ruling on the assignments of error that are raised, 21 O.S.1981, § 701.13, ¶ C, requires this Court to make three determinations. We have examined

2. The transcript of the telephone conversation reveals the following colloquy:

* * * * * *

James: Youdon't [sic] know nuthin.
Robin: Agh—I don't know.
James: You don't [sic] know nuthin.
Robin: I reckon.
James: Hey man, and I just found out today you didn't even get no money.
Robin: I wasn't going there to get no money.
James: You wasn't.....
Robin: I went there with a credit card I guess, credit card, you see what happened, he come up, I give him the credit card, he come out the booth to come back and look at my tag number.
James: ugh huh.
Robin: So I know then that if he get the tag number, as soon as I leave he gonna call the law.
James: Hugh.
Robin: Alright? [sic]
James: Ugh hugh.
Robin: OK, he gonna call the law. I got them guns, the dynamite and everything in my trunk, right?
James: Yea, I didn't know that.
Robin: I ain't going to get too far before they get on me (James: ugh huh.), so I said the way to do that if he don't be around then ain't nuthin he can tell them noway.

* * * * * *

Robin: No, but see, but that is what people fail to realize. See if he had of told on me, see I would have went anyway. See what I'm saying?
James: Yea.
Robin: And, I just looked at it I might as well. If I'm go, let me go for being a dumb son of a gun, you know a little funky gas credit card.

* * * * * *

James: Hey man, but see, I have just been thinking man, you got to be cool man, because I, you know, shit, the thing is that that's murder.
Robin: Yea, but, well, that is what I'm trying to get you to see, ain't no witnesses, so what?
James: Yea.
Robin: See, I'm what I'm trying to get you to see, if they, if I would have got caught red today, they can't find nobody that they can get up there and say yea, they seen me do this or seen me do that or this happen or that happen because there wasn't nobody there but me and him. See, and, I ain't got no guns, I ain't got nuthin.

the record in this case and have given careful consideration to the arguments of counsel and we hold:

1. That the sentence of death was not imposed "under the influence of passion, prejudice, or any other arbitrary factor." Section 701.13, ¶ D.

2. That the evidence does support the jury's finding of the statutory aggravating circumstance, § 701.12(5), the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

3. That the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[3]

The current death penalty statutes comply with the guidelines set out in *Gregg*. We have considered and overruled each assignment of error by the petitioner and have completed the statutorily mandated sentence review. We have searched the record for any fundamental error that might have prejudiced the petitioner and have found none. We find no other reason to disturb or modify petitioner's death sentence.

The judgment of guilt and the sentence of death are AFFIRMED.

BUSSEY and CORNISH, JJ., concur.

3. We have compared this case to all of the death penalty cases decided after the current death penalty statute became effective July 24, 1978. *Burrows v. State*, 640 P.2d 533 (Okl.Cr.App.1982); *Gaddis v. State*, unpublished opinion, Nov. 17, 1981; *Franks v. State*, 636 P.2d 961 (Okl.Cr.App.1981); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.App.1980); *Hays v. State*, 617 P.2d 223 (Okl.Cr.App.1980); *Chaney v. State*, 612 P.2d 269 (Okl.Cr.App.1980); *Eddings v. State*, 616 P.2d 1159 (Okl.Cr.App.1980).

Jerry Marvin CAMPBELL and Jerry Ron Brown, Appellants,

v.

The STATE of Oklahoma, Appellee.

No. F-81-587.

Court of Criminal Appeals of Oklahoma.

Sept. 14, 1982.

Defendants were convicted in the Garfield County District Court, W. O. Green, III, J., of conspiracy to manufacture and distribute controlled dangerous substance, and they appealed. The Court of Criminal Appeals, Bussey, J., held that: (1) actions by State did not constitute entrapment, (2) judge who issued search warrant properly authorized serving of warrant during night, and (3) 25 items not named in search warrant, but seized at time of search, were properly admitted into evidence.

Affirmed.

Cornish, J., concurred in results.

1. Criminal Law ⇐37(2)

"Entrapment" occurs only when criminal conduct is product of "creative activity" of law enforcement officials.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐37(4)

Actions by State did not constitute entrapment where defendants had predisposition to commit crime.

3. Criminal Law ⇐37(3)

It is not entrapment for officers merely to furnish person opportunity to commit a crime.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBYN LEROY PARKS,	)	
	)	
Petitioner,	)	
	)	APPELLATE CASE
vs.	)	NO. F-79-3
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

PETITION FOR REHEARING

Comes now, ROBYN LEROY PARKS, petitioner in the above entitled matter by and through his attorney, First Assistant Public Defender, Robert A. Ravitz and requests this Court grant rehearing and recall its opinion of August 26, 1982 for the following reasons, which violate the Constitutions of the United States and the State of Oklahoma:

1) The sentence of death is disproportionate and excessive in light of similar cases concerning both the crime and the defendant;

2) The sentence of death is disproportionate and violates the Eighth and Fourteenth Amendments to the United States Constitution in that the jury failed to find the defendant had a probability of future acts of violence which would constitute a continuing threat to society and absent this finding, the death penalty is unconstitutionally disproportionate.

3) The death penalty as applied in the instant case, violates the Eighth and Fourteenth Amendments to the United States Constitution in that it provides no measurable standard of punishment in light of the factors found to exist and not found to exist by the jury and makes no measurable contribution to acceptable goals of punishment and is nothing more than a purposeless and needless imposition of pain and suffering;

4) This Court should re-evaluate its decision in light of its misinterpretation of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed 2d 973 (1978);

5) This Court should re-evaluate its opinion wherein this Court concluded that the Oklahoma death penalty statute did not shift the burden of proof in light of the jury instructions given by the court and this Court's interpretation of this statute in Irvin v. State, 617 P.2d 588, Okl.Cr. (1980) because this interpretation violates the Eighth and Fourteenth Amendments to the United States Constitution;

6) The Fourteenth Amendment is violated by the Court's decision creating a lesser degree of proof of corpus delicti as it applies to Murder in the First Degree as compared to Murder in the Second Degree;

7) This Court should reconsider its conclusion that the death penalty was not imposed under the influence of passion, prejudice or other arbitrary factors in light of the court's statements throughout the opinion that the defendant's counsel waived all issues by failing to raise these issues at trial. Similarly, the death penalty was imposed under the influence of passion, prejudice and other arbitrary factors because of the prejudicial closing argument of the prosecutor, and this is especially true in the instant case where only one aggravating circumstance was found.

8) This Court should reconsider the conclusion that the death penalty was not imposed under the influence of passion, prejudice and other arbitrary factors where the defendant's constitutional right to effective assistance of counsel under the Sixth Amendment, the Eighth Amendment's cruel and unusual punishment clause and the Due Process Clause of the Fourteenth Amendment is violated by counsel not effectively representing his client and preserving the record

9) This Court should reconsider whether the defendant's constitutional rights to a Murder in the Second Degree instruction was violated, both under the Due Process Clause of the Fourteenth Amendment and the Oklahoma Constitution in light of the evidence brought forth to the jury;

10) This Court should reconsider its finding that the evidence supported the jury's finding of a statutory aggravating circumstance, i.e., the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution where this Court also holds that the defendant was not denied his rights to a second degree murder instruction and explain this dichotomy, said dichotomy violating the Due Process Clause of the Fourteenth Amendment;

11) Counsel readopts all other issues found in brief in support of petitioner and requests that this Court grant rehearing and reconsider all those issues.

WHEREFORE, premises considered, petitioner respectfully requests this Court grant rehearing and alternatively, reverse and remand this case or modify petitioner's sentence to life imprisonment.

Respectfully submitted,

Robert A Ravitz

ROBERT A. RAVITZ
First Assistant Public Defender
ATTORNEY FOR ROBYN PARKS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served to the Attorney General in and for the State of Oklahoma on this 15 day of Sept., 1982.

Robert A Ravitz

ROBERT A. RAVITZ

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBYN LEROY PARKS

PETITIONER,

-vs-

THE STATE OF OKLAHOMA

RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

ROBERT A. RAVITZ
FIRST ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE

Petitioner, ROBYN LEROY PARKS, was sentenced to death for the crime of Murder in the First Degree in violation of 21 O.S. §701.7. This Court on the 26th day of August, 1982, affirmed petitioner's death sentence. Defendant filed a timely request for rehearing and asked for a slight additional time to file a brief. This brief is filed in support of petitioner's timely petition for rehearing.

PROPOSITION I

THE DEATH PENALTY AS APPLIED IN THE INSTANT CASE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IS DISPROPORTIONAL UNDER THE OKLAHOMA CONSTITUTION IN THAT IT PROVIDES NO MEASURABLE STANDARD OF PUNISHMENT IN LIGHT OF THE FACTORS FOUND TO EXIST AND NOT FOUND TO EXIST BY THE JURY AND MAKES NO MEASURABLE CONTRIBUTION TO ACCEPTABLE GOALS OF PUNISHMENT AND IT IS NOTHING MORE THAN A PURPOSELESS AND NEEDLESS IMPOSITION OF PAIN AND SUFFERING.

This assignment of error goes to points 1, 2, 3 of petitioner's petition for rehearing. Petitioner contends that this case is disproportionate and excessive in light of similar cases and should be modified pursuant to this court's statutory requirement to make sure that the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. 21 O.S. §701.13 c(3). Petitioner further contends that the absence of certain findings by the jury render the penalty of death as applied in the instant case disproportionate and excessive in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Currently, forty-eight cases have been or are currently before this Court in which the death sentence was imposed. [See Appendix One]. In only 5 cases other than the initial case, was the death penalty imposed where there was a single aggravating circumstance found by the jury. In the number of those cases, the felony was that the murder was committed for remuneration and involved a contract killing. The other two cases were reduced to life imprisonment on other grounds. See

Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980) and Odum v. State, ___P.2d___, F-79-713 (Okl.Cr. Sept. 21, 1982). This case is the only case where a finding of the murder was committed to avoid lawful arrest or prosecution was the sole ground on which to impose the death penalty. In approximately 60% of the cases, the jury determined that the individual defendant had a probability of future acts of violence that would constitute a continuing threat to society and in 65% of the cases, found the aggravating circumstance of the offense was cruel, heinous and atrocious and all but 4 cases excluding the instant case, one or the other aggravating circumstance was found. This study leaves out four cases wherein the aggravating circumstances found by the jury was not obtained. See Appendix One. A comparative study of the facts of the instant case clearly demonstrate that the sentence of death as imposed on petitioner is disproportionate.

In Jurek v. Texas, 428 U.S. 262 (1976), the United States Supreme Court discussed the Texas statute dealing with the finding of probability of future acts of violence which would constitute a continuing threat to society. In Jurek, supra, the Court read into the Texas statute the requirements that the jury weigh mitigating and aggravating circumstances, the nature of the offense whether it was cruel, heinous and atrocious, whether the murder was committed for remuneration or to avoid a lawful arrest or prosecution, whether the defendant had a prior felony involving the use or threat of violence, whether he created a great risk of death to many people and all sorts of mitigating circumstances which this Court has discussed in

numerous opinions. See generally Eddings v. State, 611 P.2d 1159 (Okl.Cr. 1980) remanded for resentencing ____ U.S. ____, 102 S.Ct. 869 (1982) and Chaney v.State, 612 P.2d 269.

Outside of Oklahoma, the only states with probability of future acts of violence which would constitute a continuing threat to society as an aggravating circumstance are Texas, Oregon and Virginia. The Oregon statute patterned after the one held constitutional in Jurek, requires the judge to make a determination whether there exists a probability the defendant would commit criminal acts of violence which would constitute a continuing threat to society. Virginia requires the jury to find that (1) the defendant had a proability of future acts of violence or alternatively that the offense was outrageously cruel, heinous or atrocious. If these are found, the jury has the option to impose death over life. All other statutes have a weighing procedure similar to the one in Oklahoma. Clearly, the purpose of a weighing procedure is to determine whether a convicted capital defendant has a probability of future acts of violence. Implicitly in the requirement of the weighing procedure is the determination noted in the prevailing opinion in Gregg v. Georgia, 428 U.S. 153, (Stewart J) that to be constitutional, the death penalty must serve one of two principal purposes; retribution and deterrence of capital crimes by perspective offenders. See also Enmund v. Florida, ___U.S. ___,102 S.Ct. 3368 (1982) at 3377. Thus, unless the death penalty serves one of these principal purposes, it is nothing more than a needless imposition of pain and suffering and hence, an unconstitutional punishment.

In the instant case, the jury concluded Robyn Parks killed the deceased with malice aforethought. However, the jury also concluded that there was no probability Robyn Parks would commit criminal acts of violence which would be a continuing threat to society. In other words, the jury weighed the factors in Robyn Parks' life and the factors involving the circumstances of the crime and concluded that at most, it was a spur of the moment killing with malice aforethought and therefore required them to conclude this aggravating circumstance did not exist. It is doubtful that deterrence as a valid alternative, is meaningful absent a probability of future acts of violence on the part of an offender. Counsel knows of no studies that show deterrence available in the situation as found by the jury in the instant case. See generally, Enmund v. Florida, ___U.S. ___, 102 S.Ct. 3368 (1982).

Similarly, while retribution is a valid justification for executing some capital defendants, it is necessary to look to whom you are executing. (1) You are executing a person who killed in the spur of the moment; (2) who does not have a probability of future acts of violence which would constitute a continuing threat to society; and (3) who did not kill in a cruel, heinous or atrocious way. Clearly, if retribution applies to Robyn Parks, it applies to all people who commit First Degree Murder and there is not a meaningful basis to distinquish Robyn Parks from a whole host of others who have killed and have not received the death penalty. Gardner v. Florida, 430 U.S. 349. See also Godfrey v. Georgia, 100 S.Ct.

1759 (1980).

In conclusion, the death penalty as applied in the State of Oklahoma has almost universally required a finding that the offense was cruel, heinous or atrocious or there existed a probability of future acts of violence which would constitute a continuing threat to society. [See Appendix One setting out all Oklahoma cases dealing with the death penalty]. Obviously, the intent of the Oklahoma Legislature was in determining whether mitigating circumstances outweighed aggravating circumstances, was to determine whether factors about the individual and the crime, justify the imposition of the death penalty. Absent findings on cruel, heinous and atrocious or probability of future acts of violence which the Supreme Court of the United States in Jurek, supra, has determined to be the critical factor in making these comparisons, the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution and 21 O.S. 701.7 et. seq. Petitioner's sentence should be modified to life imprisonment.

PROPOSITION II

THIS COURT'S OPINION VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY REQUIRING AN EASIER STANDARD OF PROOF TO PROVE THE CORPUS DELICTI OF ONE DEGREE OF HOMICIDE THAN OF ANOTHER.

The United States Supreme Court in Beck v. Alabama, 447 U.S. 625 (1980) required under the due process clause the same considerations in the trial stage of a capital sentencing proceeding as in the sentencing scheme. The court stated:

> "To ensure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case."

When this Court creates a different and easier standard of proving the corpus delicti in a First Degree Murder case than in a Second Degree Murder case, it falls under the same constitutional invalidity as the prohibition against lesser included offenses in Beck, supra.

Absent the admission of petitioner, the evidence of the individual crime was a homicide which according to the medical examiner, was unnatural and was the result of bullet wounds. No evidence of the necessary element of First Degree Murder, i.e., malice aforethought, existed as a result of the death itself. Counsel concedes that malice aforethought subsequently

existed if petitioner's admissions are to be considered by the jury. This is no different however than the necessary corpus delicti of Murder in the Second Degree. What this Court has done is say that to prove a corpus delicti for Murder in the First Degree, you can eliminate the necessary element of malice aforethought. However, to prove the corpus delicti of Murder in the Second Degree, you need to demonstrate independent of petitioner's admissions, the crime of using a bogus credit card. This dichotomy makes absolutely no sense in the current status of Oklahoma law regarding corpus delicti as properly ennunciated by this Court in petitioner's opinion regarding petitioner's allegation that the element of malice aforethought was not shown as necessarily required to prove the corpus delicti to Murder in the First Degree.

Mullaney v. Wilbur, 421 U.S. 684 (1975), prohibits the assessment and the imputation of an element of a crime to prove the crime itself. According to the Court's opinion, corpus delicti means something different for Murder in the First Degree, than Murder in the Second Degree. To do this, the Court must impute malice to the defendant in violation of the Fourteenth Amendment.

This Court has created a catch twenty-two in its attempt to circumvent the clear requirement that the defendant should have been given a Second Degree Murder instruction in this case. This Court will be faced in the future with numerous cases involving Second Degree Murder charges and in those case, this Court is going to have to ennunciate a different standard for corpus delicti than it required in denying petitioner his

constitutional rights under the Oklahoma and United States Constitutions to a Second Degree Murder instruction in this case. This Court should recall petitioner's opinion because of the constitutional violation in establishing different criteria for corpus delicti or alternatively, recall this opinion because malice has been imputed to the petitioner by virtue of this Court's opinion and differential on corpus delicti.

PROPOSITION III

THIS COURT SHOULD RECONSIDER WHETHER THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A MURDER IN THE SECOND DEGREE INSTRUCTION WERE VIOLATED BOTH UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE OKLAHOMA CONSTITUTION IN LIGHT OF THE EVIDENCE BROUGHT FORTH TO THE JURY.

The petitioner does not dispute the court's statement that the requirement under federal constitutional law that a defendant is entitled to have an instruction on a lesser included offense where the evidence warrants it. Beck v. Alabama, 447 U.S. 625. This Court concluded as a matter of law that there was insufficient evidence to support the instruction on Murder in the Second Degree. This Court's interpretation is at odds with the definition of corpus delicti as discussed previously in Proposition No. II and is at odds with the evidence, facts and arguments made in the instant case.

As this Court's opinion itself shows other evidence was shown by the State which when taken in a light most favorable to the defendant, clearly shows that a Murder in the Second Degree instruction was applicable. The victim, Abdulah Ibrahim was found shot to death on the floor of a Gulf Service Station where he was employed. An unused charge slip bearing various notations on both the front and back apparently used as a scratchpad to compute customer's purchases and figure tax was found at the scene of the homicide by an investigating police officer. This same charge slip also had a license tag written across the front of it, XZ 5710 which was determined to belong to Robyn Parks (OP p. 1) Further, the evidence shown to the jury failed to demonstrate that any money had been taken during

the commission of this homicide. Further, petitioner in his initial brief before the appellate court, discusses the evidence regarding a telephone conversation between the petitioner and James Clegg which is transcribed in court's exhibit no. 1 wherein the defendant over and over again stated that he went there with a credit card and he felt that after the deceased got the tag number, he was going to call the law. A complete quotation of the statements and admissions found in court's exhibit no. 1 is located in petitioner's original brief before the Oklahoma Court of Criminal Appeals, P. 18, 19.

Later in the conversation between Robyn Parks and informant James Clegg, Robyn Parks stated:

> "I didn't take a dime. You know cause I didn't come there to take no dime, I come there to get me some gas, then when he got my number I said man, if I leave, I says I won't get two blocks before they would be on me because he gonna tell it that I got, you know a hot credit, gas credit card."

The prosecutor thereafter throughout his closing argument, stresses the factors which demonstrate murder in the second degree.

> "Now here is the way I view this evidence...I put gasoline in my car. I walk up to a window similar to this. I lay my card down. The attendent takes it. They got a little machine there. The attendent puts this card on the machine, and then the credit card on there and pull that roller over it and back and hands me my card back and then they lay this slip here in front of me, and I signed it. Then I turn and walk away. What they do with the slip, I don't have any idea. In the meantime though, they have either asked me my number and set it down, or as they hand me the slip, would you write your tag

number down on this slip here...But let's say at that point as I am walking away I haven't set my tag number down or they haven't asked me for it and they need to put it on there. I would visualize and circumstantially under this evidence that as that card lay on this ledge here where I have signed it, that part of it, in the meantime they have torn the top sheet off, you know, and given it to me, and I am walking away with it and I am back at my car, and the attendent has it there and he realizes he doesn't have a tag number. I don't even know, I can't even feel that at that point he was really suspicious that this was a stolen credit he had used. The defendant knew it. But did Mr. Ibrahim knew it? But anyway he needed a tag number on this slip there...you visualize it and interpret it anyway you want to. This is just mine and don't yield your views for mine. For goodness sake don't do that. I visualize that this slip that the defendant had signed was laying right here on this counter. That Mr. Ibrahim goes over and unlocks his door and goes around so that he could see the car. You see, from the islands and him in this little hut thing, the booth, there is no way in the world he could see the tag number of every car that is bought gas there. So now then, he has walked out of his booth, and the only person would know he walked out of his booth was whoever did the killing. The killer, see, would know that he had walked out of this booth, and was apparently setting down his tag number. And I think that is exactly what happened because there is no way you could get that door unlocked as it was when the police got there except for Mr. Ibrahim to walk out there...so anyway, here is this, I am just using this as a hypothetical example and here is this slip that is laying right here on the ledge. Mr. Ibrahim will walk out of there and he has got the tag number and he is going to come back in, he's going to come back in and he is going to transpose it on this charge slip. So as Mr. Ibrahim has got the tag number and he is going to come back and put it on this slip that's been filled out, by that time Robyn knew what was happening, and knew

that his tag number was being taken down, and he knew that he had better do somethng about it. He comes back up there and takes this gun here, he has it cocked, and he has got six shells in there and he points it through this window here, and fires it into the body of Mr. Ibrahim. Now the credit slip he signed is right here. Sure he is going to take that, isn't he? Because that is the evidence of the stolen credit card. He doesn't know but what when Mr. Ibrahim was setting down the tag number but what he was putting it on the charge slip that's laying on the ledge right here. He doesn't know that..." (Tr p. 621-623).

Thereafter the district attorney continues:

MR. McKINNEY: "That's right. That's my inference on it. If yours disagrees with mine, you stick with yours.

And, that then the defendant himself then removed the filled-in credit slip; and he doesn't know that right on the other side here, right as this drops down here, and out of his sight as he's standing there, is this one that does have the actual tag number on it. And I suggest to you that's what happened to the charge slip where this defendant did purchase the gasoline with a hot credit card. But Mr. Hood suggests, why didn't he take the slip which had his tag number on it; and I present to you that I think he did think he was taking it when he took the one that had been filled in with the use of the credit card.

And he says that the defendant would not have gone up to the booth with the stolen credit card. Well, the defendant himself tells you he did. He just flat told you that he did. You heard him as he said it. That's what he said he did. Well, you know, there would have been more risk of him being caught in a hurry if he drives up there and he fills his tank up with gas and then he just drives off without paying for it. You know good and well that within just a short time the police would be after him then. But by using a stolen credit card--particularly if he hadn't given the attendant his tag

> number--why, there would be probably no likelihood at all that he would ever be apprehended on it, so why wouldn't he have used the credit card in preference to driving away without paying for it. And Mr. Hood would say--did say to you, he says, I don't think a credit card had anything to do with the death. Well, you heard it from the lips of the defendant himself as he talked on the telephone, that the reason the killing took place was Mr. Ibrahim had took down his tag number and that was the reason for the killing; and Mr. Hood would tell you that there was no apparent reason. I say the apparent reason just stands out just as loud as it can stand out and telling you."

It is clear from this argument, the prosecutor's theory of the case was the petitioner killed while using a fraudulent credit card. It is inconceivable to petitioner in light of this argument and this evidence, how a murder in the second degree instruction was not warranted. This Court brushes this contention aside on the theory that the State had not proven the corpus delicti for the murder in the second degree. This Court then cites DeLaune v. State, 569 P.2d 463 (Okl.Cr. 1977) to support the fact that the trial court was justified in not giving a second degree murder instruction. This Court misunderstands the meaning of DeLaune. In DeLaune, supra, this Court was faced with a contention that the State had failed to prove the defendant's crime of embezzeling state funds independent of his confession and stated that the facts of that case did not so establish. This Court misinterprets the difference between the petitioner's admissions made during the commission of the phone conversation with informant Clegg and what is commonly referred to as a confession. This Court on numerous occasions, has established that before an admission is

to be a confession, the defendant must be in custody and absence a showing of custody, there is no requirement that an admission provide for the same Miranda Rights as a confession and counsel knows of no case that this Court has stated an admission is not the admissible to prove the corpus delicti of *a crime.*

What this Court has done in essence, is state in this opinion, that the State of Oklahoma can not prove the corpus delicti of a crime by the use of admissions outside any other evidence. This is contrary to law and will have a direct result of nullifying all future criminal acts where an admission is used to establish a corpus delicti.

Counsel also calls the court's attention to what is the corpus delicti in a second degree murder case. The corpus delicti is the body of the crime itself and this court has held in Bond v. State, 90 Okl.Cr. 110, 210 P.2d 784 (1949) that corpus delicti means the actual commission of a particular crime by someone. Clearly, the showing of a death by the use of a gun is sufficient to establish corpus delicti. This Court should reconsider its holding in light of the evidence presented to the jury.

PROPOSITION IV

THIS COURT SHOULD RECONSIDER ITS FINDING THAT THE EVIDENCE SUPPORTED THE JURY'S FINDING OF A STATUTORY AGGRAVATING CIRCUMSTANCE, THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR PROSECUTION, WHERE THIS COURT ALSO HOLDS THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A SECOND DEGREE MURDER INSTRUCTION AND EXPLAIN THIS DICHOTOMY, SAID DICHOTOMY VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court has consistently held that the State must bear the burden of proof in proving aggravating circumstances and that that burden is on the State to prove the circumstance beyond a reasonable doubt. Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980). In the instant case, this Court in its opinion, fails to explain the inconsistency in initially stating that petitioner was not entitled to a Murder in the Second Degree instruction and then concluding that the evidence supported the aggravating circumstance that the defendant committed the murder to escape lawful arrest or prosecution beyond a reasonable doubt. It is not necessary to be entitled to a Murder in the Second Degree instruction that the elements of Murder in the Second Degree be proven beyond a reasonable doubt to the trial court or to the appellate court. See Beck, supra. It is necessary before a jury can find an aggravating circumstance that they determine that it exists beyond a reasonable doubt. 21 O.S. §701.11. Similarly, before this court can affirm a death sentence, they must determine whether the evidence supports the jury's finding of the stautory aggravating circumstance. 21 O.S. 701.13.

This Court concluded that the aggravating circumstance was found beyond a reasonable doubt as a result of the evidence the State presented regarding the taped telephone conversation and that this conversation clearly established Parks' state of mind that he committed the murder for the purpose of avoiding or preventing a lawful arrest or prosecution. Footnote 2 to the Court's opinion reveals the telephone conversation which is exactly the same taped telephone conversation petitioner argued on direct appeal as the basis to establish the state of mind of using a credit card as the basis for a Murder in the Second Degree instruction. This Court did not in its initial opinion, explain the two inconsistencies and it is doubtful that these inconsistencies can be explained away.

PROPOSITION V

THIS COURT SHOULD RE-EVALUATE ITS DECISION IN LIGHT OF ITS MISINTERPRETATION OF LOCKETT V. OHIO, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed 2d 973 (1978).

On petitioner's direct appeal to this Court, he argued that the giving of instruction no. 9 in the penalty stage which advised the jury that they were authorized to consider all evidence presented throughout the trial in determining what sentence the defendant should receive was improper. This Court stated that this argument was wholly without merit citing Lockett, supra. The court thereafter stated:

> "Lockett authorized the sentencer in this case, the jury, to consider not only the defendant's record and character but any circumstances of the offense."

The court either misinterpreted counsel's argument or misinterprets the Supreme Court's mandate in Lockett, supra.

At the time of the United States Supreme Court decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed 2d 2346 (1971), the Supreme Court was faced with numerous capital sentencing statutes which provided uncontrolled discretion. In Furman, supra, the court held that the infliction of the death penalty could not be imposed under a sentencing procedure that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. "The Eighth and Fourteenth Amendments cannot tolerate the infliction of the sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." 408 U.S. at 309-310. [Stewart J. concurring]. The United States Supreme Court

further stated in Gregg v. Georgia, 428 U.S. 153 (1976):

> " Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Counsel's argument is not based on what is a legitimate mitigating circumstance but what factors the jury is considering in arriving at a determination that the mitigating circumstances do not outweigh the aggravating circumstances. Any factor which is not aggravating cannot be used as a basis to impose the death penalty. However, an instruction such as the one given in the instant case, allows the jury to consider any factor it so chooses in giving the death penalty. The court's reliance on Lockett, supra, is totally misplaced. Lockett dealt with the situation wherein the fact finder in the sentencing stage of a capital case in Ohio, was precluded from considering certain mitigating circumstances. The United States Supreme Court held that the sentencer in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant pro offers as a basis for a sentence less than death. 98 S.Ct. at 2965. Lockett does not deal with the situation where a sentencer is allowed to use any factor it desires to give the death penalty. The proper instruction should be that the jury is allowed to consider all evidence presented throughout the trial which relate to a statutory aggravating circumstance or anything in mitigation in

determining what sentence the defendant should receive. The type of instruction given in the instant case, failed to give the individualized consideration required in capital cases and did not control discretion as required by the Eighth and Fourteenth Amendments to the United States Constitution. Gregg, supra. See also Gardner v. Florida, 430 U.S. 349 and Eddings v. Oklahoma, 447 U.S. ____ 102 S.Ct. 869 (1982).

PROPOSITION VI

THE DEATH PENALTY WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE AND OTHER ARBITRARY FACTORS.

In the instant case only one aggravating circumstance, the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution was found by the jury. Counsel in proposition number I, demonstrates that in well over 85% of the capital cases, the finding of just one aggravating circumstance does not usually amount to a death verdict and absent a finding of either probability of future acts of violence which would constitute a continuing threat to society or that the offense was cruel, heinous and atrocious, the death penalty is rarely handed out. Counsel knows of no other capital case in Oklahoma wherein the sole finding of this aggravating circumstance rendered a death penalty verdict. Despite this, this Court concluded that the death penalty was not imposed under the influence of passion, prejudice or other arbitrary factors. Counsel contends that the arbitrary factor that this Court failed to look at was competency of counsel./1

1/ At present the record may not conclusively demonstrate constitutionally ineffective assistance of counsel under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the law on competency of counsel as stated by this Court in Johnson v. State, 620 P.2d 1311 (Okl.Cr. 1980) and absent a post-conviction evidentiary hearing, appellate counsel does not believe he can properly litigate the competency of counsel issue inasmuch as medical records of the attorney who tried the case and the physical condition of the attorney who tried this case and other factors need to be thoroughly developed at an evidentiary hearing.

While the factors necessary for a finding of a violation of petitioner's rights to effective assistance of counsel have not yet been developed and are better left for a post-conviction hearing, the petitioner contends that the facts of the instant case demonstrate that the arbitrary factor of counsel's ability and the failure to object to a totally improper closing argument requires nullification of the death sentence.

The prosecutor's improper closing argument which this Court does not consider by stating it was waived by defense counsel's failure to object, contained argument after argument which this Court has deemed prejudicial in other cases. See generally Hager v. State, 612 P.2d 1369 (Okl.Cr. 1980) reversing a death penalty and Brewer v. State, ___P.2d____ (Okl.Cr. 1982). The instances of prosecutorial misconduct in the instant case which may be considered arbitrary factors which clearly could have given the defendant the death penalty especially in light of simply one aggravating circumstance being found intially appears in the prosecutor stating his personal opinion regarding the facts of the case. (Tr p. 704-705) (Petitioner's brief p. 79). Thereafter, the prosecutor continued to downgrade the jurors' role and minimized their responsibility in assessing the death penalty. (Tr p. 707) Thereafter, counsel ridicules the defense counsel's closing argument and states his personal opinion that he had secured the death penalty in eight cases and over 50% of the cases, the defendants were white. (This argument can be found on page 81-82 of petitioner's original brief). Not satisifed, the prosecutor then goes on and conveniently talks about the

deterrent effect of the death penalty for approximately two pages of the transcript (Tr p. 726, 727) [These comments may be found verbatim in petitioner's original brief, page 83].

Petitioner contends that in light of the extremely prejudicial closing argument, in light of this court's unwillingness to address this closing argument by stating the errors were waived by counsel's failure to object and in light of the fact that past arguments consisting of the same arguments have been repeatedly condemned by this Court and finally in light of the fact that only one aggravating circumstance was found, counsel contends that the arbitrary factor of ability of petitioner's counsel denied him his rights to an effective representation at the very least in the penalty phase.

It is therefore respectfully requested that this court should grant rehearing and hold as a matter of law that there were arbitrary factors regarding the prosecutor's closing argument which calls for modification of this case.

CONCLUSION

This Court should recall its opinion of August 26, 1982 affirming petitioner's sentence of death in light of the aforementioned arguments and alternatively, reverse and remand this case for imposition of sentence for Murder in the Second Degree or modify this sentence to life imprisonment for Murder in the First Degree based on proportionality of sentencing and inconsistencies between the finding of the aggravating circumstance and the failure to give a Murder in the Second Degree instruction.

Respectfully submitted,

Robert A Ravitz

ROBERT A. RAVITZ
First Assistant Public Defender
ATTORNEY FOR PETITIONER
ROBYN LEROY PARKS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served this 23rd day of September, 1982 to the Attorney General in and for the State of Oklahoma.

Robert A Ravitz

ROBERT A. RAVITZ

(APPENDIX ONE)

TABLE OF AGGRAVATING CIRCUMSTANCES

FOUND IN DEATH PENALTY CASES

FROM 1977 to SEPT. 23, 1982

(Pending and Decided)

NOTE: Information for these statistics came from either the original record or the trial judges report on file at the Court of Criminal Appeals, unless otherwise noted.

NAME	CRUEL-HEINOUS	GREAT RISK	PROBA-BILITY	PRIOR FELONY	LAWFUL ARREST	PRISONER	REMUN-ERATION	MUR PEN OFF eff May 198
BROGIE, Kirk Wayne/1 F-80-553								
BANKS, Anthony R. F-81-179		x	x	x				
WHITE, James William F-81-384	x	x						
PARKER, Danny George F-81-997	x		x	x		x		
GREEN, Michael Wayne F-81-798	x		x	x		x		
KELLY, Ronald D. F-82-309	x		x				x	
JOHNSON, Malcolm Rent F-82-312			x	x				
MORGAN, Carl Shelton F-79-487			x	x				
COLEMAN, Charles Troy F-79-600	x	x	x	x	x			
BINSZ, Michelle Ann F-79-692							x	
BINSZ, Steven Wm. F-79-693							x	
STAFFORD, Roger Dale F-80-256	x	x	x		x/2			
AKE, Glen Burton F-80-523	x		x		x			
BOWEN, Clifford H. F-81-315	x	x			x			
DAVIS, James Douglas F-82-232	x		x					
BROADRICK, Thomas E. F-82-344			x	x				
DAVIS, Charles F-78-140, F-78-141	x	x		x				
BOUTWELL, JOHN F-78-342	x				x			
JONES, D.L. - affirmed F-80-509	x	x						
ODUM, Huey Don F-79-713	x							
COX, Venory Reversed on other grounds		x	x					
IRVIN, Warner /3 Modified on other grounds 617 P.2d 588	x							
FRANKS, Alton Carol Modified on other grounds 636 P.2d 361		x	x	x				

NAME	CRUEL-HEINOUS	GREAT RISK	PROBA-BILITY	PRIOR FELONY	LAWFUL ARREST	PRISONER	REMUN-ERATION	M F G e 1
JOHNSON, Kenneth F-80-100			x		x		x	
TOBLER, Mark Hamilton F-82-304		x	x					
HALL, Edward F-79-723	x			x		x		
COLEMAN, Charles Troy F-80-150				x				
HATCH, Steven Keith /4 F-80-302	x		x		x			
STOUT, Billy Gene /6 F-80-470								
ROBISON, Olan Randle /4 F-81-388	x/5	x	x	x				
HAYES, Roger Dale /6 F-82-466								
DRISKELL, Clifton D. /4 F-77-603	x		x					
SMITH, Larry Dean /4 F-78-331	x							
GLIDEWELL, Robert E. F-78-487					x		x	
JONES, Wm. Denton /4 F-78-604	x		x					
STAFFORD, Roger Dale /4 F-79-722	x	x	x		x			
MUNN, Anthony Ray F-81-350	x		x					
FISCHER, Joseph James /6 C-81-448								
HAYES, Thomas /3 Affirmed - 617 P.2d 223	x	x	x					
CHANEY, Larry Leon /3 Affirmed - 612 P.2d 269	x	x			x		x	
EDDINGS, Monte /3 Affirmed - 616 P.2d 1154 remanded on other grounds 457 ___U.S.___	x		x		x			
BREWER, Benjamin /4 F-79-609 Reversed on other grounds	x			x				
WILLIAMS, Levi F-80-93 Killed in penitentiary		x	x					
DUTTON, Lonnie Joe F-79-337		x	x					

NAME	CRUEL-HEINOUS	GREAT RISK	PROBABILITY	PRIOR FELONY	LAWFUL ARREST	PRISONER	REMUNERATION	MI PE OF ef Ma 19
BURROWS, William Modified on other grounds	x	x						
HAGER, Richard Reversed on other grounds 612 P.2d 1369	x		x					
PARKS, Robyn LeRoy F-79-3					x			

1/ The trial judge's report shows the court instructed that the crime was especially heinous atrocious and cruel, but shows that no aggravating circumstances were found. Appellate counsel was unavailable for clarification.

2/ Found on two of the three counts alleged.

3/ The aggravating circumstances listed were taken from the opinion of the Court of Criminal Appeals.

4/ The original record and trial judge's report were unavailable at the Court of Criminal Appeals and the information was provided by appellate counsel.

5/ Found on only one of three counts alleged.

6/ The original record and trial judge's report were unavailable at the Court of Criminal Appeals and appellant's counsel either was unavailable or did not respond to inquiry.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBYN LEROY PARKS, Appellant,	)	
-vs-	)	No. F-79-3
THE STATE OF OKLAHOMA, Appellee.	)	

ORDER DENYING PETITION FOR REHEARING

The appellant filed his petition for rehearing in the above styled and numbered appeal on September 15, 1982, from his conviction in Oklahoma County, Case No. CRF-77-3159.

NOW THEREFORE, after considering the petition for rehearing and after reviewing the record, this Court finds that the petition for rehearing should be DENIED. The Clerk of this Court is directed to issue the mandate in this cause FORTHWITH.

IT IS SO ORDERED.

WITNESS OUR HANDS and the Seal of this Court this 28th day of September, 1982.

Tom Brett
TOM BRETT, PRESIDING JUDGE

Hez J. Bussey
HEZ J. BUSSEY, JUDGE

Tom R. Cornish
TOM R. CORNISH, JUDGE

ATTEST:

Ross N. Lillard Jr.
Clerk

No. 82-5789

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBYN LeROY PARKS,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

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ATTORNEYS FOR APPELLEE

QUESTIONS PRESENTED

1. Must a trial court instruct the jury on a lesser offense where the corpus delecti of the lesser crime has not been proven independent of the Defendant's statement?

2. Does an instruction which precludes the jury from considering sympathy, sentiment, passion or prejudice or any other arbitrary factor limit the jury's consideration of relevant mitigating circumstances?

3. Did the jury instructions as a whole allow the jury to consider a non-statutory aggravating circumstance in determining the Petitioner's sentence?

4. Was the sole aggravating circumstance that the murder was commited for the purpose of avoiding or preventing a lawful arrest or prosecution a sufficient basis for the death sentence in the present case?

5. Has the Oklahoma Court of Criminal Appeals interpreted their capital punishment statute in a manner which creates an unconstitutional mandatory imposition of the death penalty and did such an interpretation unconstitutionally shift the burden of proof to the Petitioner to prove that a life sentence should be imposed?

INDEX

Cases Cited

Statutes Cited

Constitutional Citations

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBYN LeROY PARKS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 82-5789
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, State of Oklahoma, by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Oklahoma Court of Criminal Appeals entered on August 26, 1982, and to which rehearing was denied on September 28, 1982.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported as Parks v. State, 651 P.2d 686 (Okl.Cr. 1982).

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on August 26, 1982. A petition for rehearing was denied on September 28, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The United States Constitution, Amendment VIII, provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

2. The United States Constitution, Amendment XIV, provides in pertinent portion:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

3. Title 21 O.S. Supp. 1976, § 701.7, (codified as 21 O.S. 1981, § 701.7), provides:

"Murder in the First Degree

"A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

"B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson."

4. Title 21 O.S. Supp. 1976, § 701.8 (codified as 21 O.S. 1981, § 701.8), provides in pertinent portion:

"Murder in the Second Degree

"Homicide is murder in the second degree in the following cases:

" . . . .

"(2) When perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in Section 1, subsection B, of this act." [Title 21 O.S. 1981, § 701.7]

5. Title 21 O.S. Supp. 1976, § 701.9 (codified as 21 O.S. 1981, § 701.9), provides:

"Punishment for Murder

"A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

"B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life."

6. Title 21 O.S. Supp. 1976, § 701.10 (codified as 21 O.S. 1981, § 701.10), provides:

"Sentencing proceeding - Murder in the first degree.

"Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practical without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted

before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

7. Title 21 O.S. Supp. 1976, § 701.11 (codified as 21 O.S. 1981, § 701.11), provides:

"Instructions - Jury findings of aggravating circumstances.

"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing signed by the foreman of the jury the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstances is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

8. Title 21 O.S. Supp. 1976, § 701.12 (codified as 21 O.S. 1981, § 701.12), provides in pertinent portion:

"Aggravating Circumstances

"Aggravating circumstances shall be:

" . . . .

"(4) The murder was especially heinous, atrocious, or cruel;

"(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

" . . . .

"(7) The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

9. Title 21 O.S. Supp. 1976, § 701.13 (codified as 21 O.S. 1981, § 701.13), provides:

"Death penalty--Review of sentence.

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

"B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

"C. With regard to the sentence, the court shall determine:

"1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

"2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

"3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentence, shall be authorized to:

"1. Affirm the sentence of death; or

"2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

"F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal error enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Title 22 O.S. 1971, § 861 (codified as 21 O.S. 1981, § 861), provides:

"Formal exceptions to rulings or orders of the court in criminal proceedings shall not be necessary but for all purposes for which an exception has heretofore been necessary at the trial of a cause it shall be sufficient that a party, at the time the ruling or order of the court has been made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court with his general grounds therefor."

10. Title 21 O.S. 1971, § 1550.22(a) (codified as 21 O.S. 1981, § 1550.22(a)), provides:

"Taking credit or debit card --Receiving a taken credit or debit card.

"A person who takes a credit card or debit card from the person, possession, custody or control of another without the cardholder's consent, or who, with knowledge that it has been so taken, receives the credit card or debit card with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder, is guilty of card theft and is subject to the penalties set forth in Section 1550.33(a) of this title."

STATEMENT OF THE CASE

The Petitioner was charged by information for the crime of Murder in the First Degree in violation of 21 O.S. 1981, § 701.7, for the murder of Abdullah Ibrahim in Oklahoma.

The evidence at trial showed that in the early morning hours of August 17, 1977, between 12:00 and 4:00 a.m., the Defendant drove into the Gulf Self-Service located at I-35 and N.E. 36th Street in Oklahoma City (Tr. 197; Court I). The Defendant filled his gas tank and Abdullah, the attendant, exited the small brick glass building and looked at the Defendant's tag number. Abdullah Ibrahim returned to the building and, on a blank credit card slip, wrote the Defendant's tag number, "XZ-5710" (Tr. 203).

Subsequently, the Defendant approached him at the payment window. Abdullah was standing up, not moving toward the alarm, when the Defendant shot Abdullah in the chest with his Winchester Western .45 caliber gun (Court I 2). The Defendant did not take any money from the station and subsequent to the shooting, the Defendant drove away (Tr. 235).

At approximately 4:35 a.m., on August 17, 1977, Thomas Heaton pulled into this self-service gas station to buy some cigarettes (Tr. 213). He walked up to the glass door and observed Abdullah

lying on the floor in some blood (Tr. 214). Mr. Heaton also observed another man in the filling station trying to fill his tank up without avail (Tr. 214). Mr. Heaton called this person over and they decided to call the police (Tr. 214). Neither one of these men entered the booth; however, they did look through the window and they observed a credit card slip (Tr. 215). They waited for the police to arrive and they gave the police a statement (Tr. 215).

Officer Riggs and Officer Doherty arrived on the scene and they also observed the victim on the floor (Tr. 199, 221). They observed a blank credit card slip, which had a pen lying across it and which contained the written tag number "XZ-5710" (Tr. 203, 224). However, this credit card slip with the tag number was not readily observable from the outside of this booth (Tr. 252). Officer Doherty also observed that the victim's keys to his residence and the station were still in the unlocked door to this booth (Tr. 211).

Officer Lord investigated this tag number and determined from a source that the owner or driver of this vehicle was Robyn LeRoy Parks, the Defendant (Tr. 227, 255). Officer Lord received information from an informant, Ms. Hill, who told officers that the defendant was involved in this murder (Tr. 239). Ms. Hill also told the officers that she had seen a large cowboy gun tucked into the Defendant's pants prior to the shooting (Tr. 252). Ms. Hill also told Officer Lord that the Defendant might be at 1408 N.E. 34th Street, where he had been residing with James R. Clegg, Jr. (Tr. 322).

Officer Charles Douglas observed a blue Continental containing one person and the tag number "XZ-5710" on N.E. 44th and Eastern (Tr. 258). Officer Douglas caught up with this vehicle in the 1600 block of N.E. 47th Street (Tr. 158). He observed a black male enter a residence, but he was unable to apprehend this person (Tr. 259). Subsequently, this vehicle was impounded (Tr. 259).

Officer Johnson inventoried this vehicle and found a prescription bottle containing the Defendant's name (Tr. 269) and a belt containing the initials "R. L. P." (Tr. 269). Also, a latent fingerprint was lifted from the trunk area of this vehicle which was determined to definitely be the Defendant's fingerprint by

fifteen points of identification (Tr. 281). Also, eight .45 caliber Winchester Western bullets were found in this vehicle (Tr. 424).

Officer Lord, on August 19, 1977, went to 1408 N.E. 34th in search of the Defendant. The Defendant wasn't at this location, so Lord talked to Mr. Clegg. He told Mr. Clegg about the $5,000.00 reward offered by Gulf for information concerning this murder (Tr. 322).

Subsequently, Mr. Clegg voluntarily, without coercion, consented to calling the Defendant, who was in California, and he also consented to the conversation being taped (Tr. 327). At 1:29 p.m. on August 29, 1977, Officer Lord dialed 213-830-0487, which was in San Pedro, California, and Mr. Clegg talked to the Defendant (whom he recognized by voice) for 13 minutes (Tr. 309, 318, 333, 335, 339). During this phone call, the Defendant implicated himself in this murder of Abdullah Ibrahim (Tr. 310A). The Defendant admitted shooting Abdullah to avoid detection by the police for using a "hot" credit card and because he had dynamite and guns in his trunk (Court I).

On August 30, 1977, Mr. Clegg made another phone call to the Defendant from the District Attorney's office with Officer Lord present (Tr. 317). Again, 213-830-0487 was dialed and again the Defendant answered (Tr. 318, 319, 408). This conversation also was taped with the consent of Mr. Clegg. During this conversation, the Defendant told Mr. Clegg where he hid the murder weapon (Court II). After this conversaitn, the officers went to the described location and found a .45 caliber gun which contained five live rounds and which was in a holster made from a jockey strap (Tr. 409). They also found a box of ammunition containing 43 rounds of .45 caliber lead-nosed bullets (Tr. 410).

Thomas Jordan, the OSBI Toolmark and Firearm Examiner, could not positively identify the projectile that killed Abdullah as a projectile that had been fired by the .45 the officers found in the bushes because the bullet that killed this victim was deformed from hitting something (Tr. 436). However, he did specify that the .45 caliber bullet which caused Abdullah's death was the same brand and make as the 43 rounds found in the bushes by the police (Tr. 361, 432).

The Defendant, who was in California, was arrested by Deputy Sheriff Kemp and Deputy Sheriff Rose of the Los Angeles County Sheriff's Office. At the time of his arrest, the Defendant told the officers that he was Roger Wayne White and he showed the officers an identification card which contained the same name (Tr. 444). The State rested its case.

The defense then presented the Defendant in his own behalf. The Defendant testified on direct examination that he had previous problems with the law, including a conviction for Robbery by Force and Fear and a conviction for Attempted Burglary in the Second Degree (Tr. 466-468). Further, his defense was an alibi defense. He stated that he stayed with Elaine Sheets on August 16 and 17 (Tr. 489). Then he went to Kansas City to buy marijuana without avail and from Kansas City, he went to California on August 18, 1977, to buy marijuana (Tr. 500-502). He admitted owning a blue Continental, talking to Mr. Clegg on the phone, and the conversation with Mr. Clegg on the tape. He further stated that he was lying to Mr. Clegg on the phone so that the police would let his girlfriend and cousin out of jail and for the protection of and concern for his family (Tr. 475-478). He also stated that his tag number was written down at the Gulf Station because one time he bought gas but had no money, so the attendant wrote down his tag number (Tr. 482). He further stated that he disposed of the gun prior to August 17, 1977, because it didn't work properly (Tr. 515).

Elaine Sheets testified on behalf of the Defendant. She stated that the Defendant stayed all night August 16, 1977, until 7:00 a.m., on August 17, 1977, when he drove her to work in his blue Continental (Tr. 529). The defense then rested.

The trial court refused the Defendant's requested instruction on Murder in the Second Degree because there was insufficient evidence of the use of a bogus credit card and in the second stage of trial the Defendant stated that the instructions were acceptable and he did not object to any of the trial court's instructions (Tr. 543, 659). The jury deliberated and returned a guilty verdict for Murder in the First Degree against the Defendant.

In the second stage of trial, the jury was presented with the aggravating circumstances: (1) the murder was especially heinous,

atrocious or cruel; (2) the murder was commit d for the purpose of avoiding or preventing a lawful arrest or prosecution; and (3) the existence or probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury found that the only aggravating circumstance was that the murder was commited for the purpose of avoiding or preventing an arrest. The jury also determined that this aggravating circumstance outweighed any and all of the mitigating circumstances and that the Defendant should be sentenced to death. According to the jury's verdict, the trial court sentenced the Defendant to death by lethal injection.

On appeal, the Oklahoma Court of Criminal Appeals held that as a matter of law the evidence was insufficient to establish that the Defendant used a fradulent credit card in violation of 21 O.S. 1981, § 701.8(2), Murder in the Second Degree, because the Defendant's statement alone could not prove the corpus delecti of the underlying felony and, therefore, Beck v. Alabama, 447 U.S. 625 (1980), was inapplicable. The court further held the jury's Instruction No. 9, "You must avoid any influence or sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence," when considered in proper context did not nullify the court's instruction concerning mitigation. Instruction 9 was also held proper in view of Lockett v. Ohio, 438 U.S. 586 (1978), which authorized the jury to consider all evidence presented throughout the trial to determine the Defendant's sentence. The Oklahoma Court of Criminal Appeals further held that the aggravating circumstance that the murder was commited for the purpose of "avoiding or preventing a lawful arrest or prosecution" was sufficiently established because the Petitioner's taped phone conversation with Clegg clearly established the Defendant's state of mind. Lastly, the Court of Criminal Appeals held that 21 O.S. 1981, § 701.11, did not unconstitutionally shift the burden of proof to the Petitioner to prove sufficient mitigating circumstances, in violation of Mullaney v. Wilbur, 421 U.S. 684 (1975), and that the jury was not required to recommend the death penalty even if the jury determined that more than one of the aggravating circumstances existed beyond a reasonable doubt.

These issues decided by the Court of Criminal Appeals are now questioned by the Petitioner in this Petition for Writ of Certiorari to this Court.

SUMMARY OF ARGUMENT

The Oklahoma Court of Criminal Appeals did not circumvent the constitutional mandate, for a lesser instruction when supported by the evidence, created in Beck v. Alabama, 447 U.S. 625 (1980), because in this case, the evidence did not warrant a lesser instruction on Murder in the Second Degree because the only evidence of this lesser crime was the Petitioner's own recorded conversation which he refuted at trial. No evidence was presented at trial to corroborate the Defendant's statement; therefore, all the elements of the lesser crime were not established and the lesser instruction was not warranted.

Instruction 9, a general instruction, which instructed the jury to "avoid and influence of sympathy, sentiment, passion, prejudice or other arbitrary factor" and which the defendant failed to object to at trial, did not limit the jury's consideration of relevant mitigating circumstances in violation of Lockett v. Ohio, 438 U.S. 586 (1978), in light of the other instructions given in the second stage of trial. Moreover, the considerations such as sympathy, prejudice and other arbitrary factors could lead to arbitrarily, wantonly and freakishly-imposed death penalties such as those criticized in Furman v. Georgia, 408 U.S. 238 (1972).

Instruction 9, which was unobjected to at trial and which allowed the jury to consider, in determining the sentence, all the facts and circumstances of the case whether presented by the State or the Petitioner, did not allow the jury to consider a non-statutory aggravating circumstance in determining the Petitioner's sentence, in light of Instruction 4, which instructed the jury to only consider the statutory aggravating circumstances set out in the instructions and in light of this Court's mandate in Lockett v. Ohio, supra, which authorized the sentencer to consider not only the Petitioner's record and character, but any circumstances of the offense.

The aggravating circumstance that the murder was commited for the purpose of avoiding an arrest or prosecution was sufficiently established beyond a reasonable doubt, although the same circumstances did not establish the use of a bogus credit card. This sole aggravating circumstance, which outweighed the mitigating circumstances, was a sufficient finding under Oklahoma Statutes for imposing a sentence of death in the present case. For these reasons, the Oklahoma Court did not rubber-stamp this aggravating circumstance and other alleged rubber-stamped aggravating circumstances are not pertinent or relevant to the present case.

Lastly, the Oklahoma Court of Criminal Appeals has not interpreted 21 O.S. 1981, § 701.11, in a manner which creates an unconstitutional mandatory imposition of the death penalty once aggravating circumstances outweigh mitigating circumstances and the burden of proof of the mitigating circumstances was not unconstitutionally shifted to the Petitioner in light of the mandate in Lockett v. Ohio, that the jury must consider the character and record of the petitioner and any circumstances of the offense that the petitioner proffers, and in light of the fact that the jury was instructed to consider such mitigating circumstances even if the Petitioner failed to testify or failed to produce specific evidence in mitigation.

For these stated reasons, the Respondent respectfully submits that the Petitioner's Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

A LESSOR OFFENSE INSTRUCTION IS NOT CONSTITUTIONALLY REQUIRED WHERE THE EVIDENCE DOES NOT SUPPORT SUCH A FINDING.

The Petitioner asserts that the Oklahoma Court of Criminal Appeals attempted to circumvent the constitutional mandate created by this Court in Beck v. Alabama, 447 U.S. 625 (1980), by holding that there was insufficient evidence of the corpus delecti of Murder in the Second Degree, 21 O.S. 1981, § 701.8(2), independent of the statement of the Petitioner to warrant an instruction as requested by the petitioner.

In Beck v. Alabama, supra, this Court held that a Defendant was entitled to have an instruction given to the jury where the evidence warranted it. In the present case, the evidence did not warrant such an instruction because the only evidence offered to the jury to support the crime of using a fraulent credit card, 21 O.S. 1981, § 1550.22, was the Petitioner's own recorded statement with informant, Clegg, which the Petitioner at trial stated was false. No other evidence was presented to prove the use of a bogus credit card.

In Opper v. United States, 348 U.S. 84 (1974), this Court stated, "The facts of the admission plus the corroborating evidence must establish all elements of the crime." In the present case, there was an admission, but no corroborating evidence which established all the elements of the crime of Murder in the Second Degree. Therefore, the corpus delecti of this crime was not sufficiently proven beyond a reasonable doubt, and for this reason, evidence did not warrant the requested instruction. Thus, the Court of Criminal Appeals did not circumvent the constitutional mandate in Beck v. Alabama, supra, and the Petitioner's Writ should be denied.

II

INSTRUCTION 9, A GENERAL INSTRUCTION, WHICH INSTRUCTED THE JURY TO "AVOID ANY INFLUENCE OF SYMPATHY, SENTIMENT, PASSION, PREJUDICE OR OTHER ARBITRARY FACTOR WHEN IMPOSING SENTENCE" AND WHICH THE DEFENDANT FAILED TO OBJECT TO AT TRIAL, DID NOT IMPROPERLY LIMIT CONSIDERATION OF THE MITIGATING CIRCUMSTANCES.

The Petitioner asserts that this Court should grant certiorari because Instruction 9 [1] limited the Mitigating Circumstances

[1] "You have already elected a Foreman. Your verdict must be unanimous. Proper forms of verdict will be furnished you from which you shall choose one to express your decision. When you have reached a verdict, all of you in a body must return it into open Court.

"The law provides that you should now listen to and consider the further argument of counsel.

"In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider all the facts and circumstances of this case whether presented by the State or the defendant and whether presented in the first proceeding or this sentencing proceeding.

provided in Instruction 6 [2] in the present case.

The State would first submit that the Petitioner at trial stated that he found all the second stage instructions acceptable and he failed to object to Instruction 9 (Tr. 659). The State submits that the Petitioner waived any constitutional claims by failing to present them to the Oklahoma trial court. See Wainwright v. Sykes, 433 U.S. 72 (1977); 22 O.S. 1981, § 861.

Alternatively, the Court of Criminal Appeals determined that the general Instruction 9, when read in context, did not limit the consideration of the mitigating circumstances. Generally, whether a particular instruction submitted to the jury gives rise to reversible error, the court is required to view the instruction as part of a totality of the entire instructions given.

> " . . . [W]e accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973).

"All of the previous instructions given you in the first part of this trial apply where applicable and must be considered along with these additional instructions; together they contain all the law of any kind to be applied by you in this case, and the rules by which you are to weigh the evidence and determine the facts in issue. You must consider them all together, and not a part of them to the exclusion of the rest.

"You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duties as jurors impartially, consciously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

"The Court has made rulings during the sentencing stage of this trial. In doing so, the Court has not expressed nor intimated in any way the conclusions to be reached by you in this case. The Court specifically has not expressed any opinion as to whether or not any statutory aggravating circumstances exist, or whether or not any mitigating circumstances exist.

"You must not use any method of chance in arriving at a verdict but must base it on the judgment of each juror concurring therein." (O.R. 38). (Emphasis added)

[2] Instruction 6 in pertinent part provided: " . . . You must consider all the following minimum mitigating circumstances and determine whether any one or more of them apply to all of the evidence, facts and circumstances of this case.

The present instructions, which included an instruction for the jury to avoid sympathy, prejudice and arbitrary factors, considered as a whole did not restrict the mitigating circumstances in violation of Lockett v. Ohio, 438 U.S. 586 (1978), which held that the sentencer cannot be precluded from the consideration of "any aspect of a defendant's character or record and any circumstances of the offense." The clear implication of Lockett is that the mitigating circumstances must be something which concerns either the defendant's character, record or the crime itself. To assert that the jury should be allowed to consider "sympathy" is to risk violation of the standards enunciated in Furman v. Georgia, 408 U.S. 233 (1972). To allow juries to consider "sympathy" in determining who shall live and who shall die is to introduce an arbitrary factor not based on the "character" or "record" of the petitioner or of the offense itself.[3] For it was arbitrary discretion of the jury that led the Supreme Court in Furman to conclude that death sentences were being "wantonly and freakishly" imposed. Sympathy, prejudice and other arbitrary factors could also lead to death penalties being "wanton and freakishly" imposed.

To conclude, the Petitioner did not properly preserve his constitutional issue in the trial court, Instruction 9 did not limit the consideration of the relevant mitigating circumstances in violation of Lockett, and to allow juries to consider sympathy, prejudice and other arbitrary factors would be a violation of Furman. Accordingly, this Petition for a Writ of Certiorari should be denied.

"You are not limited in your consideration to the minimum mitigating circumstances set out herein, and you may consider any other or addition mitigating circumstances, if any, that you may find from the evidence to exist in this case. What facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine." (Emphasis added)

[3] See 21 O.S. 1981, § 701.13(b), which states that the Court of Criminal Appeals shall consider whether the sentence of death was imposed "under the influence of passion, prejudice or any other arbitrary factor."

III.

INSTRUCTION 9 DID NOT ALLOW THE JURY TO CONSIDER A NON-STATUTORY AGGRAVATING CIRCUMSTANCE IN DETERMINING THE PETITIONER'S SENTENCE.

The Petitioner asserts that certiorari should be granted because jury Instruction 9, which was not objected to by the Petitioner at trial, allowed the jury to consider any non-statutory aggravating circumstance in determining life or death in violation of Gregg v. Georgia, 428 U.S. 153 (1976), which required the death penalty to be imposed in a way that minimizes the risk of arbitrary and capricious action.

Instruction 9, in pertinent part provided:

> "In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider all the facts and circumstances of this case whether presented by the state or the defendant and whether presented in the first proceeding or this sentencing proceeding."

Instruction 4, which provided in pertinent part: "You may only consider those statutory aggravating circumstances set out in these instructions," when read together and in context with the other instructions such as Instruction 9 in the second stage of trial, made it clear to the jury that all the facts and the circumstances of the case could be considered by the jury in determining whether any of the listed aggravating circumstances applied to the present case. In light of the instructions, when viewed in the context of the overall charge and this Court's mandate in Lockett v. Ohio, which authorized the sentencer to consider not only the Petitioner's record and character, but any circumstances of the offense, the jury instructions did not allow the jury to consider a non-statutory aggravating circumstance. See Cupp v. Naughten, 414 U.S. 141, 146-147 (1973).

IV.

THE OKLAHOMA COURT OF CRIMINAL APPEALS PROPERLY DETERMINED THAT THE AGGRAVATING CIRCUMSTANCES THAT THE MURDER WAS COMMITED TO AVOID ARREST OR PROSECUTION APPLIED IN THE INSTANT CASE AND SUCH A FINDING WAS A SUFFICIENT BASIS FOR THE IMPOSITION OF THE PETITIONER'S DEATH SENTENCE.

The Petitioner contends that there was insufficient evidence to prove the aggravating circumstances that the murder was commited for the purpose of avoiding or preventing a lawful arrest or prosecution beyond a reasonable doubt, especially in light of the fact that the court found there was insufficient evidence that the Petitioner commited a felony by using a false and bogus credit card.

The Oklahoma Court of Criminal Appeals determined that there was sufficient evidence of this aggravating circumstance when it stated:

> " . . . This argument lacks merit because of our previous decision in Eddings v. State, 616 P.2d 1159 (Okl.Cr.App. 1980), remanded for resentencing ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), wherein we stated that: 'It is important to realize that the focus of this aggravating circumstnace is on the state of mind of the murderer . . . It is the murderer who must have the purpose of "avoiding or preventing a lawful arrest or prosecution."' Eddings v. State, supra, at 1169. The evidence presented by the State in the taped telephone conversation between the appellant Clegg and Parks clearly established Parks' state of mind. Therefore the jury had ample evidence on which to find the aggravating circumstances and no error occurred." 651 P.2d at 695. See also Chaney v. State, 612 P.2d 269 (Okl.Cr. 1981).

In Eddings v. State, 616 P.2d 1159 (Okl.Cr. 1980), the Oklahoma Court of Criminal Appeals stated:

> "It is important to realize that the focus of this aggravating circumstance is on the state of mind of the murderer rather than the officer. It is the murderer who must have the purpose 'of avoiding or preventing a lawful arrest or prosecution.' Section 701.12, supra."

The facts and the circumstances of this case proved that the Petitioner's state of mind was to murder the victim for the sole purpose of avoiding arrest or prosecution. The Petitioner stated on the tape that he did not go to the Gulf Station to get money (Court I, 2). The Petitioner stated that he murdered Abdullah because he came out of the booth and looked at the Petitioner's tag

number after the Petitioner used a "hot" credit card (Court I, 2, 3). The Petitioner then stated that Abdullah would have called the law as soon as he left the station and he didn't want the law to find the guns and everything else in his trunk (Court I, 3, 12). He was afraid that before he could get very far, the law would get him. Therefore, the Petitioner figured "if he don't be around then ain't nothin' he can tell them noway." (Court I, 3).

The Petitioner, again in this taped conversation, stated, "ain't no witness, so what?" when his friend told him that what he did was murder (Court I, 5). He further stated, " . . . I'm what I'm trying to get you to see, if they, if I would have got caught red today they can't find nobody that they can get up there and say yea, they seen me do this or seen me do that or this happen or that happen because there wasn't nobody there but me and him" (Court I, 5). Further, the Petitioner had been in the penitentiary before and did not want to go back. Moreover, the evidence at the scene, evidence in the car, the findings of the guns in the location where the Petitioner stated he placed them, the fingerprints on the car, the Petitioner's flight, and the Petitioner's use of a fake name and I.D. all substantiate and corroborate the tape and substantiated the fact that the Petitioner commited this murder to avoid an arrest or prosecution, although the same circumstances did not substantiate the use of a bogus credit card.

Since this aggravating circumstance was supported beyond a reasonable doubt and such a finding is sufficient for imposition of a sentence of death, [4] the Petitioner's argument that the Oklahoma Court of Criminal Appeals is rubber-stamping this aggravating circumstance is without merit. Also, the Petitioner's argument that the Oklahoma Court is rubber-stamping other aggravating circumstances not pertinent to the present case is of no consequence to this case and therefore, should not be considered by this Court.

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[4] See 21 O.S. 1981, § 701.12(5) and 21 O.S. 1981, § 701.11.

V.

THE OKLAHOMA COURT OF CRIMINAL APPEALS HAS NOT INTERPRETED 21 O.S. 1981, § 701.11, IN A MANNER WHICH CREATES AN UNCONSTITUTIONAL MANDATORY IMPOSITION OF THE DEATH PENALTY ONCE AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES AND THIS STATUTE DOES NOT UNCONSTITUTIONALLY SHIFT THE BURDEN OF PROOF TO THE PETITIONER TO PROVE THE MITIGATING CIRCUMSTANCES.

The Petitioner lastly asserts that the Oklahoma Court's interpretation of 21 O.S. 1981, § 701.11, in Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980), requires the jury to impose the death penalty once aggravating circumstances outweigh mitigating circumstances, and this mandatory imposition of the death penalty shifts the burden of proof to the Petitioner to prove he should live.

In Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980), the Oklahoma Court did not interpret 21 O.S. 1981, § 701.11 to require a mandatory imposition of the death penalty,[5] when it stated:

> "The only discretion provided the jury under the statute is that necessary to make a factual finding of the existence or nonexistence of aggravating and mitigating circumstances, as well as the discretion requisite in balancing the two. . . ."

In the present case, the Oklahoma Court made the following determination:

> "It is true that the Supreme Cout struck down North Carolina's death penalty statute because it made the imposition of the death penalty mandatory once first-degree murder was found. On the contrary, the Oklahoma statute provides objective standards to guide the jury in its sentencing decision; the jury is not required to recommend death even if it

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[5] Title 21 O.S. 1981, § 701.11, provides: "In the sentencing process, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life." (Emphasis added."

finds that one or more aggravating circumstances have been established beyond a reasonable doubt. Similar statutory schemes have been upheld by the Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and Proffitt v Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L. Ed.2d 913 (1976)." 651 P.2d at 694. (Emphasis added)

The Oklahoma Court has determined that the jury is not required to recommend death even if it finds that one or more of the aggravating circumstances have been established beyond a reasonable doubt; therefore, the Oklahoma Court did not interpret § 701.11 so as to require a mandatory finding of death when the aggravating circumstances outweigh the mitigating circumstances.

The instruction presented to the jury in this case also did not require the jury to give death if the aggravating circumstances outweighed the mitigating circumstances.[6] This instruction merely authorized the jury to impose death as the Petitioner's sentence if the aggravating circumstances outweigh the mitigating circumstances.

It is also noteworthy that the Petitioner at trial stated, "The defendant has read the Instructions and the verdict forms, and they are acceptable to the defendant." (T.R. 659). Thus, the Defendant never presented this argument to the trial court for a determination. One cannot complain of a failure by the court to charge on an issue without calling the attention of the court to the omission by a prayer for instruction. Humes v. United States, 170 U.S. 210, 18 S.Ct. 602, 42 L.3d. 1011 (1898):

> "It has long been the settled rule in Federal courts that an instruction by the court must be excepted to before the case is submitted to the jury in order to be availed of on appeal. This is no merely technical requirement, but is founded upon reason, justice and expediency. If the error is seasonably called to the court's attention, the court can correct it forthwith and thus, obviate the necessity of a new trial." (Citations omitted)

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[6] In the event you find unanimously that one or more of these aggravating circumstances existed beyond a reasonable doubt, then you would be authorized to consider imposing a sentence of death.

If you do not find unanimously beyond a reasonable doubt one or more of the statutory aggravating circumstances existed, then you would not be authorized to consider the penalty of death, and then sentence would be imprisonment for life.

The Petitioner further asserts in his brief that the burden of proof was impermissibly shifted to him during the second stage of the proceedings.

An indication of the United States Supreme Court's position regarding the responsibility of showing mitigating factors as to punishment was stated in Lockett v. Ohio, supra. The Court reversed and remanded petitioner's death sentence because Ohio law limited the scope of mitigating circumstances which might be considered by the sentencing authority. Although not squarely addressing the issue of burden of showing mitigating circumstances, the Court clearly implied in dicta that it is the defendant's responsibility to show factors which might lessen punishment. The plurality held:

> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis added) 438 U.S. at 604.

Furthermore, the State bears the burden of proving guilt beyond a reasonable doubt and the Petitioner is not required to produce evidence or testimony in mitigation. Rather, the trial court instructs the jury to consider mitigating factors even if the Petitioner does not take the stand and does not offer specific mitigating evidence. Accordingly, this proposition is without merit and this writ should be denied because the Oklahoma Court of Criminal Appeals has not interpreted § 701.11 in a manner which creates an unconstitutional mandatory imposition of the death penalty and the burden of proving the mitigating circumstances was not impermissibly shifted to the Petitioner.

Even if you find unanimously one or more of the aggravating circumstances existed beyond a reasonable doubt, and if you further find that such aggravating circumstance or circumstances is outweighed by the finding of one or more mitigating circumstances, then and in such event the death penalty shall not be imposed, and the sentence would be imprisonment for life. (O.R. 35).

CONCLUSION

While this Court's Rule 17 is, by its own terms, not exclusive in setting out grounds for exercise of the Court's discretionary jurisdiction, it does provide guidance as to the importance of the cases this Court will consider. The present case confronts the Court with no split among the Circuits or between a Circuit and the highest court of any State. Nor does the Court need to exercise its supervisory powers herein. The State court below has acted in accordance with decisions of this Court and had found that the Petitioner's rights have not been violated. This case simply does not merit expenditure of the Court's scarce resources. Certiorari should be denied.

The State, having answered the Petitioner's assignments of error by both argument and citations of authority, respectfully requests this Honorable Court to deny the Petitioner's Writ of Certiorari.

Respectfully submitted,

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

SUSAN TALBOT
ASSISTANT ATTORNEY GENERAL
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ATTORNEYS FOR RESPONDANT

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

Susan Talbot, being first duly sworn, upon he oath does state:

1. That I am an Assistant Attorney General for the State of Oklahoma and one of the attorneys of record in the above-styled case representing the Respondent, State of Oklahoma.

2. That on December 15, 1982, prior to 5:00 p.m., Central Standard Time, I caused to be placed forty (40) copies of the above Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals in an envelope properly addressed to the Clerk of this Court, with postage prepaid, which was deposited in the United States Mail in Oklahoma City, Oklahoma.

3. One copy of the foregoing Petition was mailed, postage prepaid, to:

Robert A. Ravitz
First Assistant
Public Defender
Oklahoma County
409 County Office Bldg.
320 Robert S. Kerr Ave.
Oklahoma City, OK 73102

4. All parties requires to be served have been served.

FURTHER AFFIANT SAYETH NOT.

Susan Talbot
SUSAN TALBOT

Subscribed and sworn to before me this 15th day of December, 1982.

L Kay Brown
NOTARY PUBLIC

(seal)

My Commission Expires: June 26, 1986.

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